

1952

Work of the Supreme Court for the Year 1951 - Statistical Survey, The

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THE WORK OF THE SUPREME COURT FOR THE YEAR 1951

STATISTICAL SURVEY

ROBERT F. PYATT*

The statistical survey for 1951 is derived from the 259 majority opinions written by the judges and commissioners of the Supreme Court of Missouri during that year.¹ This sum represents a decrease of six opinions from the preceding year. There were eight concurring opinions and twenty one concurrences without opinion. There were six dissenting opinions and thirteen dissents without opinion. The personnel of the court was changed in the following manner: Commissioner Aschemeyer resigned May 1, 1951 and Commissioner Coil was selected May 1, 1951.² Special Division III was composed of Judge Tipton of the Supreme Court, Judge Vandeventer of the Springfield Court of Appeals and Judge McDowell of the Springfield Court of Appeals.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

<i>En Banc</i>	47
Division Number One	114
Division Number Two	95
Special Division Number Three	3
Total	259

Table II represents a classification of the opinions according to their dominant issue. The selection of the most important issue was somewhat arbitrary, since nearly every case contained several issues.

TABLE II

TOPICAL ANALYSIS OF DECISIONS

Administrative Law	2
Adoption of Children	1

*Chairman, Board of Student Editors.

1. Total majority opinions for the preceding six years are as follows: 1945, 197; 1946, 181; 1947, 244; 1948, 254; 1949, 244; 1950, 265.

2. During the year 1951, Court of Appeal Judges Nick T. Cave and Samuel A. Dew and Circuit Judges Lawrence Holman and R. B. Oliver III served as Special Judges for brief periods.

Adverse Possession	1
Agency	1
Appeal and Error	20
Army and Navy	1
Attorney and Client	1
Automobiles	8
Bankruptcy	1
Banks and Banking	1
Bills and Notes	1
Boundaries	1
Brokers	1
Cancellation of Instruments	1
Certiorari	1
Constitutional Law	4
Contempt	1
Contracts	2
Corporations	2
Costs	1
Counties	1
Courts	2
Covenants	1
Criminal Law	49
Damages	4
Deeds	4
Dower	1
Easement	2
Elections	2
Election of Remedies	1
Eminent Domain	3
Escrows	1
Evidence	3
Executors and Administrators	6
Fraud	1
Fraudulent Conveyances	1
Gas	1
Gifts	1
Husband and Wife	1
Injunctions	1
Insurance	3
Intoxicating Liquors	1
Judgments	3
Labor Relations	2
Landlord and Tenant	3
Limitations of Actions	2
Lis Pendens	1
Mandamus	1

Master and Servant	13
Money Lent	1
Mortgages	2
Municipal Corporations	10
Navigable Waters	1
Negligence	14
New Trial	1
Parties	2
Powers	1
Prohibition	3
Public Utilities	1
Quieting Title	1
Quo Warranto	2
Railroads	7
Reformation of Instruments	1
Sales	1
Schools and School Districts	2
Specific Performance	2
Statute of Frauds	1
Street Railroads	4
Taxation	6
Trial	7
Trusts	6
Vendor and Purchaser	2
Venue	1
Water and Water Courses	1
Wills	8
Witnesses	1
Workmen's Compensation	3
Total	259

Table III indicates the disposition of the cases. Generally, the particular phrasing is that of the judges and commissioners.

TABLE III
DISPOSITION OF LITIGATION

Action Sustaining Motion to Quash Affirmed	1
Alternative Writ of Mandamus Made Preemptory	1
Alternative Writ of Mandamus Made Permanent	2
Alternative Writ Quashed	1
Appeal Dismissed	6
Appeal Dismissed and Cause Remanded for Further Proceedings	1
Appeal Transferred	1

Case Reversed and Remanded	2
Case Reversed and Remanded With Directions	1
Cause Remanded With Directions	3
Cause Reversed and Remanded For a New Trial	1
Cause Reversed and Remanded for Entry of Judgment	1
Cause Reversed and Remanded for Further Proceedings	1
Cause Reversed and Remanded with Directions	3
Cause Transferred to Court of Appeals	1
Court Directed to Assume Jurisdiction	1
Decree Affirmed	3
Decress Reversed and Cause Remanded with Directions	2
Dismissal Affirmed and Cause Remanded in Part	1
Judgment Affirmed	85
Judgment Affirmed on Condition of Remittitur	9
Judgment and Decree Affirmed	5
Judgment and Decree Modified and Affirmed as Modified	2
Judgment and Decree Reversed and Cause Remanded With Directions	1
Judgment and Decree Reversed and Remanded with Directions	1
Judgment, Decree and Declarations Affirmed in Part and Reversed in Part	1
Judgment Modified and Affirmed as Modified	3
Judgment Reversed	7
Judgment Reversed and Cause Remanded.....	23
Judgment Reversed and Cause Remanded for a New Trial	2
Judgment Reversed and Remanded with Directions	1
Judgment Reversed and Cause Remanded for Further Proceedings	1
Judgment Reversed and Cause Remanded for Retrial	3
Judgment Reversed and Cause Remanded with Directions	16
Judgment Reversed and Remanded for a New Trial	2
Judgment Reversed in Part and Affirmed in Part	1
Opinion of Court of Appeals Set Aside and Appeal Dismissed	1
Orders Affirmed	1
Order Granting New Trial Affirmed	5
Order Granting New Trial Affirmed and Cause Remanded	2
Order Reversed and Cause Remanded	1
Orders Reversed and Cause Remanded with Directions	1
Preliminary Rule Discharged and Preemptory Writ of Prohibition Denied	1
Preliminary Rule in Prohibition Made Absolute	1
Proceeding Dismissed	1
Provisional Rule in Prohibition Made Absolute	2
Provisional Rule Made Absolute Unless Service of Process be Obtained	1

Rule Discharged	1
Writ of Prohibition Quashed	1
Writs Quashed	1
<hr/>	
Total	259

Table IV represents the disposition of motions made subsequent to the decision, to the extent that each disposition can be determined from the reported opinions. Cases wherein rehearings were granted or which were transferred to the court *en banc* are necessarily not included within this survey.

TABLE IV
MOTION SUBSEQUENT TO DECISION

Motion for Rehearing and Motion to Transfer to Court <i>En Banc</i> Denied	1
Motion for Rehearing and to Clarify and Modify or to Transfer to Court <i>En Banc</i> Denied	1
Motion for Rehearing Denied	40
Motion for Rehearing Denied and Opinion Modified on Court's Own Motion	1
Motion for Rehearing or to Modify or to Transfer to Court <i>En Banc</i> Denied	3
Motion for Rehearing, or to Reconsider, or to Reinstate or to Transfer to Court <i>En Banc</i> Denied	1
Motion for Rehearing or to Transfer to Court <i>En Banc</i> Denied	56
Motion for Rehearing or to Transfer to Court <i>En Banc</i> Denied Opinion Modified	1
Motion for Rehearing or to Transfer to Court <i>En Banc</i> Denied and Opinion Modified on Court's Own Motion	1
Motion for Rehearing Withdrawn	1
Motion to Transfer Motion to Modify Opinion to Court <i>En Banc</i> Denied	1
Motion to Transfer to Court <i>En Banc</i> Denied	2
<hr/>	
Total	109

APPELLATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

While questions relating to the jurisdiction of the supreme court have, in previous years, resulted in numerous opinions and many transfers for lack

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of jurisdiction, the year under review shows only three cases in which such questions were involved. Of these three, two were transferred to the appropriate courts of appeal. In the third, the supreme court retained jurisdiction.

In *Cooper v. School District of Kansas City*¹ the suit was to enjoin defendant school district and its officers from certifying the result of an election authorizing a tax increase to be levied upon the real estate in the school district. Upon an appeal from the order of the trial court dismissing plaintiff's petition appellants attempted to justify their appeal to the supreme court upon the grounds that the school district is a political subdivision of the state, that the construction of the revenue laws of the state are involved, and that the amount in dispute exceeds the sum of \$7500. Rejecting the first two grounds as untenable, the court held, that although the question was one of first impression, the record sufficiently disclosed the fact that the money value of the relief to plaintiff, and the money value of the corresponding loss to defendant is well in excess of \$7500. The court commented that while it may not be possible, in a case of this nature, to estimate accurately the value of the tax savings to the appellants, it was clear that, if relief should be granted, the loss in money value to the school district would approximate \$3,000,000.

In *McBee v. Twin City Fire Insurance Company*,² while the suit to recover a fire insurance loss included \$5000 for the real estate, \$2000 for personal property and \$700 for vexatious delay, it conclusively appeared that some of these items had been paid by the company and that only \$2300 was actually in dispute.

In *State v. Church of God*,³ the suit was for an injunction against the church and certain members of its official board, plaintiffs claiming that defendants padlocked the church and were threatening to sell the church property. Although both parties to the appeal assumed that the case involved title to real estate, the court pointed out that the main purpose of the action was merely to establish rights under and in compliance with the terms of a deed and to enforce those rights as between contending factions of the church, and that, in the constitutional sense these issues did not involve title to real estate. Accordingly the case was transferred to the appropriate court of appeals.

THE RIGHT OF APPEAL

The most important decision of the year, dealing with the right of appeal, is the opinion of the court *en banc* in *Steuernagel v. St. Louis Public*

1. 239 S.W. 2d 509 (Mo. 1951).

2. 235 S.W. 2d 283 (Mo. 1951).

3. 243 S.W. 2d 308 (Mo. 1951).

Service Company.⁴ That was an action for personal injuries, the verdict being in favor of plaintiff for \$10,000. Defendant's motion for new trial challenged the verdict as excessive. Eighty-nine days after the motion was filed the trial court entered an order that the motion would be overruled if plaintiff within ten days should file a remittur of \$5000, otherwise the motion to be sustained on the ground that the verdict was excessive. Eleven days thereafter the court entered a further order reciting that plaintiff failed to comply with the order of remittitur and ordering that the motion for new trial be sustained on the ground that the verdict was excessive. Plaintiff appealed, contending that the final order of the court on motion for new trial was entered more than 90 days after it had been filed and that, because of the provisions of Section 510.360, *Missouri Revised Statutes* (1949), the motion was overruled 90 days after it had been filed, and because defendant had not appealed, the full judgment was a final judgment. The court holds that the order directing a remittitur cannot be construed as an illegal enlargement of the 90 day period provided for by the statute; that the order was, in effect, and although in the alternative, the proper action of the trial court "passing" on the motion within 90 days. The court further held that the judgment was not a final judgment until final *disposition* of the motion, as is provided by Section 510.340. The court states that "it is reasonable to hold, when the ground is excessive verdict, that the motion is *passed on* when the order is made stating the alternative choices to be given plaintiff and the results to be reached from either choice; but that the *disposition* of the motion, making the judgment final, is completed by the expiration of the period granted to plaintiff in which to make his choice."

On motion for rehearing plaintiff asked for a modification of the opinion to make final disposition of the case saying that only the issue of the amount of the damages remained, and that issue had been briefed by both parties. The court then considered that issue on its merits, decided that the trial court did not abuse its discretion in ordering the remittitur, and remanded the case with directions to the trial court to satisfy the order granting new trial and allow plaintiff to file a remittitur of \$5000 within a time to be fixed by the trial court and that, if such a remittitur was not made, to order a new trial on the ground that the verdict is excessive. In dealing with this rather unusual, and exceedingly important, issue as to the effect of an order of remittitur extending the 90-day period provided for by the statute, the supreme court did not undertake to inquire as to its own jurisdiction.

4. 238 S.W. 2d 426 (Mo. 1951).

From the result reached, it seems obvious, that since plaintiff only sought to have her \$10,000 verdict sustained, and defendant took no appeal from the \$5000 judgment, only \$5000 was involved. Under that view, appellate jurisdiction would have been in the appropriate court of appeals.

In *Downey v. United Weatherproofing, Inc.*,⁵ the suit was for damages and injunctive relief against a corporation and two individual defendants. The corporate defendant filed its motion to dismiss each count of the petition on the ground that it failed to state a claim upon which relief could be granted against it. That motion was sustained and plaintiff appealed from the judgment of dismissal as to the defendant corporation. The appellate court, upon inquiry to the clerk of the trial court, ascertained that there had been no disposition of the case as to the individual defendants. Accordingly the appeal was dismissed as premature because no disposition had been made as to the two remaining defendants.

The case of *Wicker v. Knox Glass Associates*,⁶ was an action to recover damages for personal injuries, the suit being against two corporate defendants. The verdict was against defendant Knox Glass Associates, but in favor of the other corporate defendant. The trial court ordered a remittitur of a part of the judgment against Knox Glass Associates and, upon plaintiff's failure to remit, sustained its motion for new trial. Plaintiff appealed from that order and also from the judgment entered in favor of the other corporate defendant. The court affirmed the order sustaining the motion for new trial as to the one defendant, and dismissed the appeal from the judgment in favor of the other defendant as premature, holding that the effect of sustaining the motion for new trial as to one defendant prevented the entry of a final judgment as to the other defendant.

The case of *Bennett v. Wood*,⁷ was brought against several defendants to determine the existence of several trust estates. A counter-claim and cross-claim was filed on behalf of some of the defendants. The trial court, after a trial on the merits, entered a decree with respect to the trust estates but did not dispose of the merits of the counter-claim and cross-claim. Although the question was not raised by the parties, the court dismissed the appeal as being premature because the decree did not dispose of all issues as to all parties in that it failed to adjudicate the counter-claim and cross-claim. Similarly, in *Deeds v. Foster*,⁸ an action in ejectment and for partition of

5. 241 S.W. 2d 1007 (Mo. 1951).

6. 242 S.W. 2d 566 (Mo. 1951).

7. 239 S.W. 2d 325 (Mo. 1951).

8. 235 S.W. 2d 262 (Mo. 1951).

real estate where the judgment in favor of the defendants did not undertake to quiet and determine title in accordance with the prayer of a compulsory counter-claim filed by the defendant, plaintiff's appeal was dismissed as being premature because the judgment appealed from did not undertake to dispose of the issues upon the counter-claim and, for that reason was not a final judgment.

While the court seldom undertakes to exercise the discretion granted to it by Section 512.160, *Missouri Revised Statutes* (1949), by assessing a penalty for vexatious appeals, nevertheless, in *DeMayo v. Lyons*,⁹ where the appellant on the third appeal in the same case raised only the contention that the trial court erred in carrying out the decision of the supreme court made on the prior appeal, a 5% penalty was assessed and the appeal dismissed as vexatious.

RECORDS AND BRIEFS

The court continues to show liberality, in the interests of justice, in dealing with infractions of its own rules with reference to records and briefs. In *Roach v. Kohn*,¹⁰ appellant's brief almost entirely failed to comply with the rule¹¹ with reference to statement of the points relied upon and specification of errors relied upon for reversal. Nevertheless, the appeal was considered by the court upon its merits. Also, in *Starr v. Mitchell*,¹² the transcript on appeal showed that the notice of appeal was not filed until 13 days after the date of the order overruling the motion for new trial. The court, on its own initiative, made inquiry of the clerk of the trial court and discovered that the transcript on appeal inadvertently misstated the date on which the motion for new trial was actually overruled, ordered the record corrected, and held that the appeal was timely because, actually, the notice of appeal was filed within 10 days after the motion for new trial had been overruled.

It will be noted, however, that the liberality of the court with respect to infractions of its own rules is not extended to the point where the positive requirements of statutory law have been disregarded. In *Brand v. Brand*,¹³ appellant filed only an abbreviated transcript of the record which the trial court had refused to approve and to which adverse counsel had refused to consent. While recognizing the discretionary right of the appellate court to make orders for the completion of an incorrect transcript, the court re-

9. 243 S.W. 2d 967 (Mo. 1951).

10. 235 S.W. 2d 284 (Mo. 1951).

11. Supreme Court Rule 1.08 (a) (3).

12. 237 S.W. 2d 123 (Mo. 1951).

13. 245 S.W. 2d 94 (Mo. 1951).

fused to exercise that discretion and held that the provisions of Section 512.110, *Missouri Revised Statutes* (1949), with respect to the two methods of verification of the transcript of the record on appeal required a dismissal of the appeal itself. The court points out that the provisions of Rule 1.04, which authorize a respondent to file such additional part of the record as he deems necessary, should not be construed as depriving a respondent of his right to move for the dismissal of the appeal for appellant's failure to perform his own duties or as requiring a respondent to complete an appellant's incorrect or defective transcript.

CRIMINAL LAW

HIRAM H. LESAR*

Cases in the field of criminal law continued to account for nearly twenty per cent of the supreme court's opinions during the year 1951. Approximately one-third of the 49 decisions involved cases where the defendant was not represented by counsel on appeal or, if so, no brief was filed. It is indicative of the care with which the court considers the records that two of sixteen such cases were reversed.¹

While it is neither necessary nor possible within the limits of this article to discuss all of the cases decided by the court, the more significant decisions are commented upon under the usual headings. The number of such decisions is perhaps greater than in any recent year.

I. PROCEDURE BEFORE TRIAL

Except for one case involving a well established rule on search and seizure² and one involving arraignment,³ the 1951 decisions on procedure before trial dealt only with the sufficiency of informations. In *State v. Lamb*,⁴ the defendant was arraigned, and refused to plead, in the presence of the prospective jurors before the trial panel was selected. It was argued that the court erred in permitting the information to be read at the arraignment without excluding the jurors from the court room. The trial court having instructed the jury that the information was just a "formal statement of the accusation or charge against the defendant and is no evidence whatever of

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1. The overall total: 11 cases reversed, 38 affirmed.

2. *State v. Hawkins*, 240 S.W. 2d 688 (Mo. 1951). Recovered stolen property which was in a parked automobile and was seen through the windows by officers walking by was not evidence obtained by unlawful search. A search implies a prying into hidden places.

3. *State v. Lamb*, 239 S.W. 2d 496 (Mo. 1951).

4. *Ibid.*

his guilt," the supreme court held that there was no prejudicial error. The court added that it is better practice not to read the information to the jury *after* the panel is selected. Even in that situation the court has held that it is not reversible error to permit the information to be read if the jury is properly instructed on its effect,⁵ and there would appear to be no reason for a different rule on the facts in the *Lamb* case.

In a case presenting a point not previously passed on, the court stated that, since in the absence of a statute the state need not divulge the names of its witnesses in the information, the Missouri statute⁶ requiring the state to endorse the names of witnesses on the information does not require it also to give the addresses of the witnesses.⁷

In *State v. Eslinger*,⁸ a conviction of grand larceny was reversed, the court holding that the information, which charged that the defendant "unlawfully" "did take, steal and carry away" cattle of another, was fatally defective in not using the statutory term, "feloniously." Although this rule seems unduly technical,⁹ it is settled in this state by a long line of cases.¹⁰

In *State v. Nelson*,¹¹ the defendant was the exclusive agent of the seller to sell real estate. By the terms of a contract of sale, the buyer paid \$3,000 to the defendant, which sum was to be returned to the buyer if he was unable to secure financing of the balance of the purchase price or if the seller failed to furnish marketable title. The contract further recited that the \$3,000 was received by the seller. Against the contention that the information should have alleged the money to have been the property of the buyers, it was held that it properly alleged ownership in the seller. As in larceny, the purposes of alleging ownership of property embezzled are to show that the defendant was not the owner and to inform him of the crime. These are accomplished, the court points out, by alleging ownership in one who is a "special" owner, that is, one who has an interest, not necessarily absolute, in the property.

An information which charged two distinct offenses in one count was

5. *State v. Gilmore*, 81 S.W. 2d 431 (Mo. 1935).

6. Mo. REV. STAT. § 545.240 (1949).

7. *State v. Hawkins*, 240 S.W. 2d 688 (Mo. 1951).

8. 238 S.W. 2d 424 (Mo. 1951).

9. It can hardly be contended that the information did not indicate the charge to be larceny or that the defendant was prejudiced. Cf. Mo. REV. STAT. § 545.030-1 (18), 2 (1949). Particularly since theft of any cattle is a felony. *Id.* § 560.155.

10. The cases are collected in the principal case and in *State v. Pryor*, 342 Mo. 951, 119 S.W. 2d 253 (1938). The safe course would seem to be to include "feloniously" in all charges of felony except those under a statute which, by omitting words such as feloniously, knowingly or unlawfully, requires no intent.

11. 240 S.W. 2d 140 (Mo. 1951).

held to be duplicitous.¹² This and other cases involving the sufficiency of the information to charge a particular crime depend on the elements of specific offenses. Therefore, they are discussed under that heading.¹³

II. TRIAL

A. Selection of the Jury

The Missouri statutes provide that in class three and four counties the clerk of the circuit court shall draw the names of jurors in the presence of the other jury commissioners, who are the circuit judges and the judges of the county court.¹⁴ In two cases the court held that there was reversible error where the names were drawn by the judges of the county court.¹⁵

The systematic exclusion of women from those called for jury service was held, in *State v. Smith*,¹⁶ not to be cause for reversal where the defendant's counsel knew of the practice and made no objection or challenge to the array before the jury was sworn. The court held, in *State v. Hinojosa*,¹⁷ that it was not an abuse of the trial court's discretion to overrule an objection to a woman juror upon the ground that her husband was president of the board of police commissioners and the prosecution depended on police witnesses, although it might have been more prudent to have sustained the objection.

B. Defense Counsel

In *State ex rel Bradford v. Dinwiddie*,¹⁸ it was held that the trial court had discretion to remove the court-appointed counsel for the defendant, where his position as an inactive deputy sheriff was deemed inconsistent, even though the removal was asked by the state and not by the defendant.

C. Evidence

1. Confessions and Admissions

The supreme court, in *State v. McQuinn*,¹⁹ held that the *corpus delicti* need not be *completely* proved by other evidence in order that an extra-judicial confession be admissible in evidence, and pointed out that the *corpus*

12. *State v. Griggs*, 236 S.W. 2d 588 (Mo. 1951).

13. *Infra*, Part III.

14. Mo. REV. STAT. §§ 494.230-250 (1949).

15. *State v. McGoldrick*, 236 S.W. 2d 306 (Mo. 1951); *State v. Emrich*, 237 S.W. 2d 169 (Mo. 1951). In the former case the names of prospective jurors were also written on slips of paper that were not uniform as to size and kind of paper, contrary to the statute.

16. 240 S.W. 2d 671 (Mo. 1951).

17. 242 S.W. 2d 1 (Mo. 1951).

18. 237 S.W. 2d 179 (Mo. 1951).

19. 235 S.W. 2d 396 (Mo. 1951).

delicti in homicide consists of (1) the death of a person and (2) a criminal agency as the cause of the death. There are Missouri cases in which the court has said that the *corpus delicti* includes a third element, commission of the criminal act by the accused,²⁰ and also cases in which the court has indicated that an extra-judicial confession must be "fully" corroborated by other evidence.²¹ It is not clear whether the latter cases are announcing a different rule than is announced in the principal case, but, in any event, the *McQuinn* case is in accord with the general tenor of American decisions on both points.²² That an accused may not be convicted upon an uncorroborated extra-judicial confession is a sensible rule.²³ Beyond this, the question for the court is whether, upon all the evidence, reasonable men may conclude that the accused is guilty beyond a reasonable doubt.

During the year 1951, the court also reaffirmed its previous position that a confession is not rendered inadmissible solely by the fact that it was made while the accused was being illegally held in custody.²⁴

In *State v. Green*,²⁵ it was held that the rule, excluding evidence of the fact that the defendant escaped from jail where he was then being held under two or more separate charges, was inapplicable where the defendant, in his testimony in chief, admitted the escape and that he was being held under the same charge for which tried. The case was reversed, however, for error in admitting that part of a written confession which detailed six other crimes with which defendant had been neither charged nor convicted.

2. Burden of Proof—Insanity as a Defense

In reaffirming its position that a defendant who pleads insanity as a defense has the burden of proving it by the preponderance or greater weight of the evidence, the supreme court reversed convictions in two cases because the instructions required the proof of insanity to be to the "satisfaction" or "reasonable satisfaction" of the jury.²⁶ The court found one line of Missouri cases approving instructions similarly worded and another line approving

20. See *e.g.* *State v. Dickson*, 78 Mo. 438 (1883); *State v. Bass*, 251 Mo. 107, 157 S.W. 782 (1913). *Contra*: Concurring opinion in *State v. Joy*, 315 Mo. 19, 285 S.W. 489, 494 (1926), accepted by the court in *State v. Kaufman*, 329 Mo. 813, 46 S.W. 2d 843 (1932).

21. See *State v. Coats*, 174 Mo. 396, 74 S.W. 864 (1903). *Cf.* *State v. Kaufman*, 329 Mo. 813, 46 S.W. 2d 843, 848 (1932): "Full proof of the corpus delicti independent of the confession is not required."

22. See 7 WIGMORE ON EVIDENCE §§ 2070-2073 (3d ed. 1940).

23. 2 BURDICK, LAW OF CRIMES § 425 (1946). *Cf.* 7 WIGMORE ON EVIDENCE §2070 (3d ed. 1940).

24. *State v. Bradford*, 240 S.W. 2d 930 (Mo. 1951).

25. 236 S.W. 2d 298 (Mo. 1951).

26. *State v. Barton*, 236 S.W. 2d 596 (Mo. 1951) (*en banc*), noted 17 Mo. L. REV. 95 (1952); *State v. Eaves*, 243 S.W. 2d 129 (Mo. 1951).

similar language if accompanied by the further phrase, "by the preponderance or greater weight of the evidence." It stated that the former cases were no longer controlling and that in its opinion all reference to the jury's "satisfaction" and "reasonable satisfaction" should be omitted.²⁷

One of these cases, *State v. Barton*,²⁸ is also noteworthy for a forceful concurring opinion, in which a majority of the judges joined, which takes the position that it is wrong to require the defendant to prove his defense of insanity by even a preponderance of the evidence, although no other course is open as long as Section 546.510 of the *Missouri Revised Statutes* (1949) remains unchanged.²⁹

3. Proof of Prior Conviction Under Habitual Criminal Act

In *State v. Hagerman*,³⁰ the court points out that the Habitual Criminal Act does not specify the method for proving prior conviction and sentence. The best evidence, then, is the original record or a duly authenticated copy thereof, plus evidence indentifying the accused as the convict.

D. Instructions

As indicated above, the court disapproved of the inclusion of reference to the jury's "satisfaction" and "reasonable satisfaction" in an instruction on the defendant's burden where insanity is pleaded as a defense.³¹ In *State v. Eaves*,³² the court also held such an instruction bad as tending to disparage the defense because it referred to the defense as one "interposed by the defendant's counsel as an excuse for the charge set forth in the information."

While the trial court in a murder case is bound to instruct on manslaughter if the evidence presents such an issue, even though no instruction is tendered,³³ it properly refused such an instruction where the evidence did not present that issue.³⁴ The same principle was involved in *State v. Jordan*,³⁵ a larceny case, where all the evidence showed the value of the property to be over \$30, and the court said that the trial court would not have been justified in instructing on petty larceny.

27. *State v. Barton*, *supra* note 26.

28. *Ibid.*

29. The Barton case is fully discussed in a note, 17 Mo. L. Rev. 95 (1952).

30. 244 S.W. 2d 49 (Mo. 1951).

31. *State v. Barton* and *State v. Eaves*, *supra* note 26.

32. *Supra*, note 26.

33. See *State v. Smith*, 240 S.W. 2d 671 (Mo. 1951), where it was argued that the court should have so instructed, but the court held the only issues were murder or self defense.

34. *State v. Riggs*, 237 S.W. 2d 196 (Mo. 1951). See also *State v. Rhoden*, 243 S.W. 2d 75 (Mo. 1951) (no duty to instruct on collateral issue unless requested).

35. 235 S.W. 2d 379 (Mo. 1951).

In *State v. Hinojosa*,³⁶ the court, in considering an apparently novel question, ruled that the statute³⁷ requiring instructions to be in writing did not make it error for the trial court to orally *withdraw* an instruction so given.

Several other cases discussing instructions involve the definition of specific crimes and are treated hereinafter.³⁸

E. Conduct of Jury

In two cases,³⁹ the court reviewed the evidence and concluded that the state had sustained the burden of showing that the jurors were not subjected to any improper influences during separation prior to submission of the cause. But in one of these cases the court, with reference to evidence concerning unauthorized use of the telephone by the jurors and their receipt of uninspected packages, commented that its discussion was made "without in the least condoning the unlawful and dangerous practices disclosed."⁴⁰

F. Argument of Counsel

Despite the fact that the defendant had been twice found guilty by a jury of the offense charged, the court, in *State v. Dupepe*,⁴¹ reversed a robbery conviction for error of the trial court in overruling an objection to the prosecuting attorney's referring in his argument to the fact that the defendant had not testified.

III. SPECIFIC OFFENSES

A. Bad Check Crimes

The fact that there are several criminal statutes in Missouri where bad checks of some kind are mentioned makes it necessary, in drawing informations and indictments, to distinguish carefully a number of different fact situations. During the 1951 term, the supreme court construed these statutes in four cases.⁴²

36. 242 S.W. 2d 1 (Mo. 1951). This case also approved the wording of an instruction on culpable negligence.

37. Mo. REV. STAT. § 546.070 (4) (1949).

38. *Infra*, Part III.

39. *State v. Bayless*, 240 S.W. 2d 114 (Mo. 1951); *State v. Fletcher*, 244 S.W. 2d 99 (Mo. 1951). In the former case the court held that on a common sense construction there was no separation after submission.

40. *State v. Bayless*, 240 S.W. 2d 114, 124 (Mo. 1951).

41. 241 S.W. 2d 4 (Mo. 1951). See Mo. REV. STAT. § 546.270 (1949).

42. *State v. Griggs*, 236 S.W. 2d 588 (Mo. 1951); *State v. Polakoff*, 237 S.W. 2d 173 (Mo. 1951); *State v. Ridding*, 239 S.W. 2d 494 (Mo. 1951); *State v. Bird*, 242 S.W. 2d 576 (Mo. 1951).

There are four main bad check crimes under the statutes:

1. The drawing or uttering (that is, passing) of a check for the purpose of procuring anything of value (regardless of amount) or with the intent to defraud, knowing that the maker or drawer has not sufficient funds in the depository for payment, is made a misdemeanor by Section 561.460 of the statutes.⁴³

2. Obtaining, or attempting to obtain, any money or property, with intent to cheat and defraud, by means of a false or bogus check or a check drawn on a bank in which the drawer knows he has no funds is made a felony, punishable by imprisonment up to seven years, by Section 561.450.

3. Forgery, or the falsely making or altering, of a check is made a felony, punishable by imprisonment from two to ten years,⁴⁴ by Section 561.080.

4. Uttering (selling, exchanging, delivering or offering to do so or to receive for consideration) a forged or falsely altered check is made a felony, punishable the same as forgery,⁴⁵ by Section 561.090.

In addition to these statutes, the general false pretense statute, Section 561.370, which provides for punishment as for stealing, refers to obtaining money or property by any false writing.

Three of the 1951 cases deal with the second crime. In *State v. Griggs*,⁴⁶ the defendant cashed a \$20 check, drawn on a bank in which he had no funds, at a store where he bought \$1.95 worth of egg mash. The information was held duplicitous because in one count it charged the crime as though under Section 561.450 and, additionally, charged the receipt of money by a false representation, as under Section 561.370.

The court points out that there was actually no express statement by the accused that he had an account in the bank. This alone might remove the case from the operation of Section 561.370.⁴⁷ But in any event, the court states that Section 561.450, having been repealed and reenacted, with the no funds case added, in 1913, is a later statute than Section 561.370 and that if the facts fall within the terms of the later statute, as they did in this case, the crime should be so charged. A similar conclusion had been reached earlier with respect to the special insufficient funds statute (case 1 above).⁴⁸

43. All references are to Mo. REV. STAT. (1949), unless otherwise indicated. In *State v. Richman*, *infra* note 48, the defendant gave a check for over \$700 for cattle, and the act was said to be under this section if a crime.

44. § 561.330 (2).

45. See also § 561.250, dealing generally with uttering forged instruments.

46. *Supra*, note 42.

47. There is a conflict in the cases with regard to the necessity of a representation extrinsic to the paper itself. See Note, 35 A.L.R. 344, 348 (1925).

48. *State v. Richman*, 347 Mo. 595, 148 S.W. 2d 796 (1941).

A further difficulty with Section 561.450 is that it was designed in part to reach the "confidence game." The court in the *Griggs* case cites cases⁴⁹ stating that under the statute there must be a confidential relationship between the accused and his victims, but states that this may arise out of "an ordinary business transaction, such as the purchase of property and the giving of a check therefor." It concludes on this point: "It is not too much to say that the confidence which is necessarily reposed in the genuineness and value of commercial paper in the transactions of the modern business world, and the consequent facility with which checks may be used as a means to perpetrate frauds must have prompted the legislature in its amendment of 1913." In other words, if, with intent to defraud, one obtains property by means of a check, drawn on a bank in which the drawer knows he has no funds, the act falls within the statute and it is unnecessary to allege or prove a confidential relation. As applied to check cases within the terms of the statute this seems to be a correct construction.

The main instruction in the *Griggs* case was also held bad for failure to require a finding that the accused *knew* he had no funds in the bank. In *State v. Polakoff*,⁵⁰ where the defendant drew a check, using the name of a woman as drawer, it was held that the information properly charged that defendant knew *she* (the supposed drawer) had no account in the bank. In accordance with the distinction made in the subsequent case of *State v. Bird*,⁵¹ this was really a bogus check, and the decision appears to be correct.

The *Bird* case involved a conviction on an information alleging that the defendant obtained money and goods by means of a check drawn on a bank in which he had no funds, where the verdict was guilty of "Obtaining money and Goods By means of a Bogus check." It was held that the verdict was not responsive to the issues and was fatally defective. The court points out that a false or bogus check, which was within the statute prior to the 1913 amendment, includes "one drawn on a non-existent bank or by or payable to a fictitious person." This must be distinguished from "a genuine check drawn on a bank in which the drawer knew he had no funds," the provision added to what is now Section 561.450 by the 1913 amendment. Section 561.450 thus covers situations where the accused fraudulently obtains, or attempts to obtain, anything of value by means of (1) "a trick . . . or device, commonly called the 'confidence game,'" (2) a false or bogus check, (3) a

49. *State v. Block*, 333 Mo. 127, 62 S.W. 2d 428 (1933); *State v. Herman*, 162 S.W. 2d 873 (Mo. 1942).

50. *Supra*, note 42.

51. *Ibid.*

check drawn on a bank in which the maker knows he has no funds and (4) corporation stock or bonds, other written instruments or spurious coin or metal. These means must be distinguished in drawing informations and verdicts in order that the latter may conform to the former, and also in determining whether to allege a confidential relation⁵² and whether to proceed under the false pretenses statute if that statute would otherwise be applicable.⁵³

The fourth case in this field, *State v. Redding*,⁵⁴ was a case of forgery under Section 561.080 (case 3, above). Earlier decisions, by way of dictum, had stated that this section applies only to forgery of instruments purporting to be *executed by* a bank. In the *Redding* case the court points out that this is not true. The statute also applies to a second situation, forgery of instruments *drawn on* a bank.

B. Assault with Intent

In *State v. Berry*,⁵⁵ the court again points out the distinction between Sections 559.180 and 559.190. Both statutes deal with assault with intent to kill, do serious bodily harm or commit a felony; both define similar specific intent crimes. The difference is that the former statute also requires "malice aforethought." The verdict in this case found the accused guilty of assault with intent to ravish and assessed the punishment at life imprisonment. The punishment was excessive under Section 559.190, where the maximum is five years, and the verdict was insufficient under Section 559.180 because it did not find the act was done "of malice aforethought." The case was reversed and remanded for a new trial.

C. Homicide

The court, in *State v. Riggs*,⁵⁶ held that the trial court correctly refused to instruct on manslaughter in a murder prosecution where the killing occurred more than seven hours after deceased allegedly assaulted the defendant, the defendant engaged in varied activities with other persons in the interval and there was no other evidence that the killing was done in the heat of passion.

52. See discussion of Griggs case, *supra*.

53. *Ibid.*

54. *Supra*, note 42.

55. 237 S.W. 2d 91 (Mo. 1951). See also *State v. Hagerman*, 244 S.W. 2d 49 (Mo. 1951).

56. 237 S.W. 2d 196 (Mo. 1951).

D. Rape

In a rather unusual factual situation, the court refused to hold that it is physically impossible to commit rape upon a sleeping woman.⁵⁷

E. Contempt

A point not previously passed on by the supreme court was presented in *Osborne v. Pardone*.⁵⁸ The petitioners in this habeas corpus proceeding had been sentenced to jail for contempt in undertaking to present and presenting false testimony in a personal injury suit. They argued that they were entitled to be discharged from the trial court's order to show cause upon filing a verified categorical denial of the charge, leaving them punishable only for the crime of perjury. The court quoted the Supreme Court of the United States that "purgation by oath" is no longer a bar to prosecution for contempt. Further, it ruled that that doctrine was not part of the common law of England prior to 1607 and therefore was never the law of this state. The court also held that the criminal contempt was not a specific crime entitling petitioners to a trial by jury and that the basis of the charge against petitioners was not perjury but obstructing the administration of justice by procuring perjured testimony.

IV. APPEALS

During the year, the court again had occasion to point out that assignments of error not made in a motion for new trial are not reviewable,⁵⁹ and that where there is no bill of exceptions review is limited to the "record proper."⁶⁰ It should be pointed out here that the new Rules of Criminal Procedure abolish formal exceptions and the distinction between the record proper and the bill of exceptions.⁶¹ The rules also abolish writs of error.⁶²

A question of whether the defendant had waived his right of appeal was presented in *State v. Harmon*.⁶³ The state argued that he had because the defendant's motion for new trial was dismissed on the *defendant's* motion. The court, while stating that the defendant could waive this right, held that the facts of his filing notice of appeal on the same day judgment was pronounced and the trial court's fixing and approving the appeal bond at the same time were inconsistent with the idea of waiver.

57. *State v. Stroud*, 240 S.W. 2d 111 (Mo. 1951).

58. 244 S.W. 2d 1005 (Mo. 1951) (*en banc*).

59. *State v. Dennis*, 242 S.W. 2d 534 (Mo. 1951).

60. *State v. Abbott*, 236 S.W. 2d 592 (Mo. 1951), where the court refused to review instructions and the motion for new trial, although they were included in the transcript because no bill of exceptions was filed. See also *State v. Felder*, 242 S.W. 2d 535 (Mo 1951).

61. Rules 28.01, 28.08, effective January 1, 1953.

62. Rule 28.02. There was one writ of error case during the year. *State v. Bird*, 242 S.W. 2d 576 (Mo. 1951).

63. *State v. Harmon*, 243 S.W. 2d 326 (Mo. 1951).

EVIDENCE

JACKSON A. WRIGHT*

During the year 1951, the Supreme Court of Missouri considered questions of evidence in twenty-nine separate cases which were deemed of sufficient interest to consider here.

The generally well established rules of evidence were followed in all instances.

JUDICIAL NOTICE

Judicial notice was considered in nine separate cases during the year. In the combined cases of *Giers Implement Corporation v. Investment Service, Inc.*, and *Roofing Application Company v. Investment Service, Inc.*,¹ the court took judicial notice of the charter of the City of University City. It likewise took judicial notice of the statutes of Vermont in the case of *Howard National Bank and Trust Company v. Jones*.² However, in the case of *McIlwain v. Kavorinos*,³ which was a retrial of an action for unlawful detainer which had previously been appealed to the supreme court, the court stated that, while it would ordinarily take judicial notice of its own records for proper purposes, it could not take judicial notice of evidence in a prior trial which was not incorporated or offered in the subsequent trial. The question arose in this case over a finding of jurisdiction. The court held that it would not take judicial notice of evidence in the prior trial of the case that 3924 Main Street, Kansas City, Missouri, was located in Kaw Township, and the mere address was not sufficient to give the court judicial knowledge of the location of the address.

In *Walters v. Markwardt*,⁴ the court held that it was common knowledge that filling stations usually have grease pits, and that it would impracticably interfere with the use of the grease pits to fence them.

Judicial notice was also taken, in *Dister v. Ludwig*,⁵ of the following: The distance in which a car could be stopped going fifteen miles an hour, that the speed of an average man walking was between two and three miles an hour; that a certain reaction time was involved between the seeing of an approaching object and the stopping of a car; and that a man walking a little faster than the average would be walking approximately three and one-half miles per hour. In *Venditti v. St. Louis Public Service Company*,⁶ judicial notice

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1. 235 S.W. 2d 355 (Mo. 1950).

2. 243 S.W. 2d 305 (Mo. 1951).

3. 236 S.W. 2d 322 (Mo. 1951).

4. 237 S.W. 2d 177 (Mo. 1951).

5. 240 S.W. 2d 694 (Mo. 1951).

6. 240 S.W. 2d 921 (Mo. 1951).

was taken of the reduced purchasing power of a dollar, and in *See v. Wabash Railroad Company*,⁷ notice was taken that a truck moving up a steep grade at four or five miles per hour could be stopped almost instantly, and that a whistle or bell of a train could be sounded in a second or less.

However, in the case of *In re City of Kinloch*,⁸ the court refused to take judicial notice that a newspaper was published in a particular city, or in the county nearest to the city.

In a personal injury action in which some of the evidence was to the effect that a certain distance was in terms of "blocks", the court stated that in the absence of other evidence, the term "block", when used as a measure of distance, would be deemed by the court to mean about 300 feet.

RELEVANCY, MATERIALITY, COMPETENCY

A. Competency in General

The case of *State v. Green*,⁹ was a prosecution for robbery. While the defendant was awaiting trial on this and other charges, he escaped. On trial of the charge, the trial court admitted evidence of the escape, which was alleged to be error upon appeal. The court held that the ordinary rule, that where the defendant was awaiting trial on more than one charge and escapes, evidence of such escape could not be introduced was based upon the theory that it is impossible to tell which of the various charges was feared by the defendant to be proven upon trial. However, in the instant case, it was not error since the evidence in the case also showed that this was the particular charge of which the defendant was afraid. This evidence was through the defendant's own testimony, so the reason for the exclusion would not hold, and the evidence was competent. The court, in the same case, however, upheld the well established rule that the evidence of other and separate robberies was not admissible, when there had been no charge or conviction upon such other robberies, either as impeachment or to test the credibility of the witness.

The plaintiff in *Eld v. Ellis*,¹⁰ brought a suit to quiet title to certain lots on the ground of adverse possession. During the trial of the cause, the defendant testified to admissions which had been made by the plaintiff. The plaintiff did not deny such admissions. The admissions were in the nature of an acknowledgment of defendant's title during a conversation between

7. 242 S.W. 2d 15 (Mo. 1951).

8. 242 S.W. 2d 59 (Mo. 1951).

9. 236 S.W. 2d 298 (Mo. 1951).

10. 235 S.W. 2d 273 (Mo. 1950).

the defendant and plaintiff in which the defendant testified that the plaintiff stated that "he (plaintiff) was glad he (defendant) had bought the lot since he (plaintiff) did not get it." It is interesting to note that the supreme court upon appeal held that this evidence, unexplained and not denied, was sufficient to justify a finding of acknowledgment of the defendant's title. In the same case, testimony was rejected on the part of the plaintiff to the effect that he did not know that city taxes had to be paid every year, and to corroborate such testimony the plaintiff offered to testify that his wife paid all of the bills including the taxes prior to the time of her death. The court said that this was properly rejected as not competent as corroboration. The plaintiff on appeal contended that such corroborative testimony was competent as evidence of the payment of taxes by the plaintiff in possession. The court held that it was not offered as evidence of payment at the time of the original trial, and that the plaintiff could not switch the nature of his offer upon appeal, to bring in the evidence on another theory.

The case of *Eller v. Crowell*,¹¹ involved a consideration of evidence which was excluded by the trial court on a proffer of proof. The court held that if the proffer of proof contained both admissible evidence and inadmissible evidence, the trial court was not required to sort out the competent from the incompetent, and the action of the trial court in excluding the proffered evidence would be sustained.

The appellant in *Wilcox v. Coons*,¹² alleged error in the trial court based upon the fact that the respondent was permitted in the trial to question one of respondent's witnesses as to his practice of law, his service as a special circuit judge, and other questions relating to his business. The court overruled the contention, stating that on the question of identification of witnesses, it is entirely proper, either by introduction or on cross-examination, to identify a witness and to inquire into his residence, antecedents, social connections, and occupation, particularly as they reflect his credibility as a witness.

In a general statement upon competency of evidence, the court in *Jones v. Terminal Railroad Association of St. Louis*,¹³ stated that the admission of evidence of collateral issues is a question of relevancy, cogency and of probative force. The question arose over the offer of evidence of similar acts of negligence as that alleged to be contributory negligence on the part of the plaintiff. The court said that the evidence of similar acts of negligence on the

11. 238 S.W. 2d 310 (Mo. 1951).

12. 241 S.W. 2d 907 (Mo. 1951).

13. 242 S.W. 2d 473 (Mo. 1951).

part of the plaintiff in this instance were inadmissible when irrelevant to the issues, and should be excluded when they introduce new controversial points and a confusion of issues. However, when they are closely related to the main issue involved in the case, then its value is high enough to disregard the objections, and the trial court does not err in admitting such collateral issues.

B. Parol Evidence Rule

The appeal in *Warriner v. Nugent*,¹⁴ presented an interesting question with regard to the parol evidence rule. The case involved a suit for damages for breach of an oral contract. The respondent contended upon appeal that the trial court had properly directed a verdict in favor of the respondent-defendant on the grounds that no contract appeared except a written contract composed of a note which the evidence showed to have been paid in full. The court points out that the respondent is relying on the rule that (quoting from another case) "When a written contract shows on its face that it includes the entire agreement and expresses all the obligations assumed by the parties thereto . . . then in the absence of fraud or mistake, parol evidence is not admissible to add to, vary, modify, or contract the terms of the written contract." In other words, the parol evidence rule. The court holds, however, that the rule was not properly invoked in this case. The court states that the rule is not a rule of evidence, but a rule of substantive law, which defines the limits of a contract, and that it fixes the subject matter for interpretation, though not itself a rule of interpretation. The court continues, "As applied to contracts, the parol evidence rule assumes that there has been a legal act consisting of a promise or set of promises; it also assumes the integration of that act in a written memorial. It assumes the proper interpretation of a written memorial according to some standard which the law adopts; and these assumption being made, excludes from consideration all other elements of the act though they might have been material had there been no integration in a written memorial. In other words, the written memorial, as interpreted by the law, is, for legal purposes, the sole act of the parties in regard to the matter up to the time of integration. The parol evidence rule does not apply to every contract of which there is written evidence, but only 'applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement.'" The court held in this instance that the rule did not apply, since the question was not an interpretation of a written agreement, but a question as to whether or not the agreement was

14. 240 S.W. 2d 941 (Mo. 1951).

wholly contained in the writing, or whether the promissory note in evidence was only a part of the over-all agreement.

In *Kast v. Kast*,¹⁵ the parol evidence rule was properly invoked in an action for a declaratory judgment to construe a property settlement which had been entered into between a husband and wife. The contract provided for a transfer in the future by the husband to the wife of "Seventy-five shares of stock of Sears-Roebuck & Company, if and when said stock is received by the defendant from the profit sharing fund of said Sears-Roebuck & Company." Thereafter, and before the stock was received by the defendant, a four-for-one split was made by the company. The court held that the contract by its terms was ambiguous as to the subject matter of the contract, so that parol evidence was admissible to explain the intent of the parties, which was found to be that the stock, or its equivalent, should be transferred, and that the plaintiff in this instance would be entitled to the increased number of shares.

C. Cross Examination

The problem of the nature and extent of cross examination in criminal cases was presented in two cases. In both cases, the rule was followed that the defendant, or his spouse, could only be cross examined as to matters referred to in the direct examination.¹⁶ In the latter case, a prosecution and conviction of a murder in the second degree, the defendant's wife testified on direct examination to an alibi, that the defendant was home when the crime was committed. On cross examination, the defendant's wife was asked whether or not the defendant was home when their baby was born over two months later. Proper objection was made, and overruled by the court. This was held to be in violation of the statute, and reversible error.

In civil cases, the court continued to hold that the scope of cross examination was largely in the discretion of the trial court. In *Malone v. Gardner*,¹⁷ the court held that while a party could not impeach his own witness, that when such witness unexpectedly surprises or traps the party on direct examination, such party may be permitted to introduce into evidence prior contradictory statements of the witness, and to interrogate the witness about such statements. The court also permitted the plaintiff to cross examine the wife of the defendant in *Kunz v. Munzlinder*.¹⁸ This was an action for the wrongful death of the plaintiff's wife, in which the defendant

15. 235 S.W. 2d 375 (Mo. 1951).

16. *State v. Green*, *supra* note 8; *State v. Emrich*, 237 S.W. 2d 169 (Mo. 1951).

17. 242 S.W. 2d 516 (Mo. 1951).

18. 242 S.W. 2d 536 (Mo. 1951).

counterclaimed for damages to himself, and for medical expenses and loss of services of his wife and daughter. The defendant's wife testified in favor of the defendant's theory of the case, and the plaintiff cross examined her with regard to whether or not she thought her suit was being tried and whether or not she thought that her damages would be recovered in this suit. This was strongly objected to by the defendant, but the supreme court held such examination proper, on the theory that the scope of cross examination into interest or bias in the case is rather wide, and in the discretion of the trial court.

D. Hypothetical Questions

In *Cruce v. G. M. & O. R.R.*,¹⁹ an action under the Federal Employers Liability Act for injuries to a foreman when a steel cable broke allowing a coal chute pan to fall on plaintiff, the court allowed expert engineers to testify as to their opinion of the cause of the break of the cable, based upon hypothetical questions, where such questions were found to contain only facts which were in evidence, or fair inferences arising out of facts in evidence.

WITNESSES

The court in the case of *Missouri Cafeteria, Inc. v. McVey*²⁰ defines the extent to which a party is bound by the testimony of an adverse party. The court holds that where a party calls an adverse party as a witness to prove an essential part of his case, he may do so, and is only bound by the part of the opponents testimony which is offered by him and vouched for by him as the truth. However, the counsel for the adverse party is thereafter entitled to cross examine generally on all matters not involved in the direct examination.

ADMISSIONS AND CONFESSIONS

In the cases of *Phillips v. Vrooman*,²¹ *Cruce v. G. M. & O. R.R.*,²² *Higgins v. Terminal Railroad Association of St. Louis*,²³ *Merrick v. Bridgeways, Inc.*,²⁴ and *Burr v. Singh*,²⁵ the question was presented as to the extent to which a party is bound by testimony either of such party or of his witnesses. The supreme court in the *Merrick* case quotes the general rule as laid down in *Adelsberger v. Sheehy*²⁶ to the effect that where a party relies

19. 238 S.W. 2d 674 (Mo. 1951).

20. 242 S.W. 2d 549 (Mo. 1951).

21. 238 S.W. 2d 355 (Mo. 1951).

22. 238 S.W. 2d 674 (Mo. 1951).

23. 241 S.W. 2d 380 (Mo. 1951).

24. 241 S.W. 2d 1015 (Mo. 1951).

25. 243 S.W. 2d 295 (Mo. 1951).

26. 232 Mo. 954, 59 S.W. 2d 644 (1933).

upon testimony of a single witness to prove a material issue in the case, and the testimony of such witness is contradictory and conflicting, with no explanation of such conflict and nothing to indicate which version of the witness's testimony is true, a jury should not be permitted to speculate. However, in this case, the plaintiff had changed his testimony in a deposition given three months after the accident. The change was made only a few days before the trial, and the defendant was not advised of such change. The defendant, upon cross examination, was allowed to examine the plaintiff on the reasons for the change, and upon the discrepancy in his testimony. The court held, in this event, that the issue was for the jury as to the credibility of the witness. The *Phillips* case was an action for damages arising out of an airplane crash. It was alleged that there was negligence in the defendant's failure to stop the plane before it became airborne due to the misfiring of the engine. The plaintiff testified that he did not hear the engine misfiring until the plane was actually airborne, and the defendant alleged that this testimony was contrary to the plaintiff's theory of the case, and thus a judicial admission and prima facie conclusive upon the plaintiff. The court held, however, that since the plaintiff also testified that he, the plaintiff, had punctured eardrums which diminished his hearing very much, this was sufficient explanation to take it out of the rule. There was likewise other evidence in the case that the misfiring had actually begun before the plane became airborne, and that the question then became a question for the jury. In the *Cruce* case, an action under the Federal Employers' Liability Act, the plaintiff was not bound by the evidence of the chief engineer of the railroad given in a deposition which was introduced in evidence by the plaintiff, where such evidence was contradicted by other evidence. In the *Higgins* case, prior statements were introduced in evidence. The court held these prior statements to be admissible for the purpose of impeachment of the witness, but they did not destroy the prima facie probative effect of the contrary testimony at the subsequent trial, and such testimony became a question for the jury. In the *Burr* case, the court again held the plaintiff not bound by contradictory evidence. This was an action for damages arising out of the head-on collision of two cars, one of which was driven by each of the two defendants in the case. The plaintiffs made their case by the testimony of both defendants. Each defendant testified that he was on his own side of the road, and that the other defendant crossed the centerline of the highway and into the path of his car. After a verdict for the defendants, the trial court granted a new trial on the ground that the verdict was against the weight of the evidence. The defendants attempted to foreclose the plaintiff's right to a new

trial under the above rule. The court rejected this theory and held that the testimony of the defendants was not at war with, but was consistent with the theory of the plaintiff's case. The court states that the plaintiffs were not bound by the testimony of either of the defendants that he was on his own right hand side of the highway, inasmuch as such testimony of each defendant was in conflict with the testimony of another witness for the plaintiffs, to-wit: the other defendant.

In the criminal case of *State v. Allen*,²⁷ Judge Hollingsworth in a very lucid opinion again upheld the general rule that the fact that the defendant refused to make any statements after he was arrested was no admission or confession of guilt, since once the arrest was made, he had no reason to make any statements. The court stated that it did not fall within the rule of "Silence" when "only a guilty party would have remained silent." Likewise, the court held that comments on the fact that neither the defendant nor his wife testified were reversible error as being directly contrary to the statutes providing that such failure to testify was not evidence and cannot be commented upon in any way.

PRESUMPTIONS

In the case of *Mothershead v. Milfeld*,²⁸ a case to quiet the title to a strip of property, evidence was introduced that a fence had existed upon the disputed line for a long period of time. The court held that such long acquiescence in a fence as a boundary line would warrant the presumption that such is the true line, and that such acquiescence is evidence of a parol agreement to consider such line as the boundary line. The court goes further and states that where such fence is acquiesced in for a great number of years, the presumption becomes conclusive evidence that it be considered the true property line.

EXPERT TESTIMONY

In the case of *Cruce v. G. M. & O. R.R.*,²⁹ the scope of an expert's testimony was considered. It was held that a doctor, examining a party for the purpose of testifying at the trial, could testify as to the then present complaints told to the doctor by the patient, and the doctor's observations from his examination. It was held, however, that it was error to give in evidence statements of the patient with respect to his past physical condition, circumstances surrounding the injury, or the manner in which the injury was received.

27. 235 S.W. 2d 294 (Mo. 1950).

28. 236 S.W. 2d 343 (Mo. 1951).

29. *Supra* note 21.

HEARSAY

It was held in the case of *State v. Allen*,³⁰ that hearsay testimony was improperly admitted. Statements of the deceased, made at least an hour and fifteen minutes after the shooting, to the effect that the defendant was the one who did it, were improperly admitted. The court pointed out that there was no showing that it was part of the *res gestae*, or that the statements were a part of a dying declaration. Likewise, statements of the wife of the defendant to the effect that the defendant also shot her were improperly admitted since they were not shown to be part of the *res gestae*, and thus not admissible under the exception to the hearsay rule.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.

[*Editor's Note.* Most of the 1951 cases in this field were discussed by Mr. Becker in the January, 1952 issue (17 *Missouri Law Review* 32). This article will be brought down to date in an early number.]

INSURANCE

ROBERT E. SEILER*

In 1951 the Missouri Supreme Court handed down only three insurance decisions. In the first decision, *Butterworth v. Mississippi Valley Trust Co.*,¹ the court declared the Missouri law to be that under certain circumstances an assignment of a life insurance policy to one without any insurable interest is valid to the entire extent of the policy proceeds. In the second case, *Cloughly v. Equity Mutual Insurance Company*,² the court resolved a coverage dispute in favor of the insured. In the third case, *Hawkinson Tread Tire Service Co. v. Indiana Lumbermens Mutual Insurance Company*,³ the court had before it what apparently is its first "use and occupancy" policy case.

In *Butterworth v. Mississippi Valley Trust Co.*, *supra*, one Asa C. Butterworth took out an ordinary life policy on himself and then made an absolute assignment of the policy to his creditor, G. Locke Tarlton. The two were close business associates in several profitable ventures. The assignment

30. *Supra* note 26.

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1. 240 S.W. 2d 676 (Mo. 1951).

2. 243 S.W. 2d 961 (Mo. 1951).

3. 245 S.W. 2d 24 (Mo. 1951).

was part of a complete financial settlement between the two. Thereafter Tarlton assigned the policy to a trust created for his wife and daughter. At first Tarlton, and later the trust, paid the premiums. After Tarlton's death, Butterworth purported to assign his interest in the policy to a trust of his own. After Butterworth's death, the Tarlton trust collected the proceeds of the policy. Thereupon the trustees under the Butterworth trust sued for an accounting of the proceeds. It was conceded that the Tarlton trust had no insurable interest in Butterworth's life. The supreme court held that Tarlton could nevertheless lawfully assign the policy to the Tarlton trust, since it was plain from the record that the assignment was made in good faith and not to cover up a gambling transaction.⁴

In *Cloughly v. Equity Mut. Ins. Co.*, *supra*, the insured sued the insurance company on its "Standard Workmen's Compensation and Employer's Liability Policy" to recover the amount which he had been required to pay personally in damages to an injured employee upon the insurance company's refusal to accept liability under the policy. The policy covered injuries to employees engaged in "farm" operations, or "operations necessary, incident or appurtenant thereto, or connected therewith" anywhere in the state of Missouri. The employee was injured while engaged in removing lumber and material from a building in St. Louis, to be taken to the farm in Pike County to be used thereon. The court held that it was a jury question both as to whether the purpose of the work done was to take the material to the farm for use there for farm purposes, and also as to whether the work was incident or appurtenant to or connected with the farm operations. Ellison, C. J., dissented.⁵

In *Hawkinson Tread Tire Service Co. v. Indiana Lumbermens Mutual Ins. Co.*, *supra*, suit was brought on a "use and occupancy" policy indemnifying plaintiff for the actual loss sustained in event the building and equipment where plaintiff conducted a tire retreading business were damaged by fire necessitating a total or partial suspension of business. Plaintiff's leased premises on Twelfth Street in St. Louis were burned out on February 28, 1946, the day its lease expired. It would have required ten months to have put the Twelfth Street premises back in shape for occupancy. Plaintiff had already intended to move into a new building on Market Street and went ahead with its plans, although the Market Street building was not complete

4. This case is the subject of a well written note in 17 Mo. L. Rev. 100 (1951).

5. According to a summary appearing on page 71 of the May, 1951 issue of the *Missouri Bar Journal*, it was held in divisional opinion in this case that the dismantling of the building in St. Louis was a landlord, not a farm, function and not covered by the policy. Tipton, J. dissented.

until several months after the fire. Within five months following the fire, plaintiff's operations were back to normal. The policy insured against the actual loss sustained "for not exceeding such length of time as would be required with the exercise of due diligence and dispatch, to rebuild, repair or replace such part of the property . . . as has been destroyed or damaged. . . ." The insurer contended that the "actual loss sustained" should be computed during the period following the fire until plaintiff reattained normal operations five months later. The plaintiff contended that the actual loss sustained should be computed by projecting the business at the Twelfth Street location for the ten months required to rebuild the building and resume operations therein, less the profits from actual operations over said period at the Market Street address. The court held that the loss should be computed as if the business had been in operation at the Twelfth Street address for such length of time as would be required with due diligence, etc. to rebuild the property, with the actual profit and loss at the Market Street address taken into account in any reduction of the loss sustained. The court also held that the "appraisal" clause of the policy did not bar the action, conceding that the defendant had made demand for appraisal, as the amount of loss was incidental to the real controversy between the parties as to the legal meaning of the terms of the policy. As stated earlier, this case seems to be the first one where a "use and occupancy" policy, in wide use these days in the business world, has been before the court.

PROPERTY

WILLARD L. ECKHARDT*

COMMON LAW, AND STATUTE LAW OF ENGLAND

The most important of the laws of the Territory of Missouri was the act in 1816 adopting "the common law of England, which is of a general nature [,] and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the first, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with the constitution and laws of the United States shall be the rule of decision in this territory, until altered or repealed by the legislature, any law [,] usage [,] or custom to the contrary notwithstanding . . ."¹

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1. Act Jan. 19, 1816, Mo. Laws 1815-16, p. 32, §1; 1 Mo. Terr. Laws, p. 436, § 1. The commas in brackets in the part quoted in the text do not appear in the

The date selected has reference to the first permanent English settlement in the new world, Jamestown; the expedition left England in December, 1606, and arrived at Jamestown in May, 1607; and generally it must have been intended to adopt in Missouri the law those settlers brought with them from England. The point of time, "prior to the fourth year of James the first," is not easy to fix. The third year of James I was March 24, 1605 n.s., through March 23, 1606 n.s., and the fourth year began March 24, 1606 n.s. The acts of Parliament cited as "anno tertio Jacobi I, 1605," were passed at a session held from November 5, 1605 until May 27, 1606; it will be noticed that this session which began in the third year of James I ended in the fourth year of James I.² Similarly, the acts of Parliament cited as "anno quarto Jacobi I, 1606," were passed at a session held from November 18, 1606, to July 4, 1607, a session which began in the fourth year of James I and ended in the fifth year of James I. There is the further complication that acts became effective by relation back to the first day of the session.³ Thus it will be seen that it may not be enough to say that "prior to the fourth year of James the first" means prior to 1607, as do a number of Missouri cases.⁴ Even if "prior to 1607" is meant, it is not clear when 1607 began, January 1, 1607, as the historians generally assigned dates, or March 25, 1607, as the lawyers assigned dates.

The Missouri act of 1816 adopting the common law is not altogether clear as to the date of the common law so adopted, but the reference to statutes in aid of or to supply the defects "of the *said* common law" would indicate rather clearly that the common law adopted also was that prior to the fourth year of James I. In 1825 the reference to "the *said* common law" was dropped and the act as amended read: "the common law of England, and all statutes or acts of parliament made prior to the fourth year of the reign of James the first, and which are of a general nature . . ."⁵

printed session acts, but do appear in the 1842 reprint in 1 Mo. Terr. Laws. In view of the fact that the original rolls of the acts were burned in 1837, the exact form of the original act cannot be known. On the defects in the reprint, Mo. Terr. Laws, see McCULLOCH, MISSOURI STATUTE ANNOTATIONS 176a (1898; 2d ed. 1902); see also Summers, *Missouri Statute Revisions and Compilations*, 3 V.A.M.S., p. 199. In view of the uncertainty as to whether the first bracketed comma should be in the act, no further notice has been taken of it.

2. See Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 V.A.M.S. § 2, n. 7, p. 8.

3. COKE, *FOURTH INSTITUTE* 25 (1644). This doctrine was abolished by Statute 33 Geo. III, c. 13 (1793).

4. *Industrial Acceptance Corp. v. Webb*, 287 S.W. 657, 660 (Mo. App. 1926); *Dean v. Lee*, 227 Mo. App. 206, 211, 52 S.W. 2d 426, 429 (1932).

5. MO. REV. STAT. p. 491, § 1 (1925). The first part of the present act, MO. REV. STAT. § 1.010 (1949), is substantially the same.

Here there is no internal indication whether the common law adopted is that prior to the fourth year of James I, or that prior to some other date, *e.g.*, July 4, 1776. A statement in a recent text on property would seem to indicate that the critical date in Missouri is 1776.⁶ That author cited as authority *Dickey v. Volker*,⁷ a case holding that early English chancery proceedings, even though records of cases pending or decided prior to the fourth year of James I, do not announce the common law pertaining to the administration of charitable trusts in Missouri, but are only evidence or expositions of the common law. In the course of its opinion the Missouri court quoted from Ruling Case Law and a Nebraska decision, both of which indicate that the American Revolution is the critical point, but the Missouri court does not in any way indicate that the Revolution is the critical date in Missouri; rather the opinion indicates that 1607 is the critical date in Missouri. *Davis v. Stouffer*⁸ held that an English decision in 1844 on common law marriage, a mutation or new view which did not state the common law of England as it was understood to be by the courts and the legislatures of this country when the common law was introduced here, was not binding on the Missouri courts.

The recent case of *Osborne v. Purdome*⁹ seems to be the first Missouri case definitely to decide the critical date as to the common law adopted in Missouri. In that case the court held that "purgation by oath," a defense to indirect criminal contempt which developed and was in vogue in England after 1607, was never the law in Missouri.¹⁰ The court says: "The statute by which we adopted the common law of England specifically includes only the common law in force prior to the fourth year of the reign of James the First, S 1.010, RSMo 1949, which was the year 1607 . . ."

ORIGINAL TITLES—AGRICULTURAL COLLEGE LANDS

In my review of the work of the Missouri Supreme Court for 1950, I attempted to explain the rather curious form of deeds for so-called "Agricul-

6. 1 POWELL, REAL PROPERTY ¶ 80, n. 71 (1949).

7. 321 Mo. 235, 254, 11 S.W. 2d 278, 285 (1928), *cert. denied memo, op.*, 279 U.S. 839 (1929).

8. 132 Mo. App. 555, 570, 112 S.W. 282, 285 (1908).

9. 244 S.W. 2d 1005, 1011 (Mo. 1951).

10. The court merely cites "41 Harvard Law Review 51" [Curtis & Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. (1927)1], but gives no detail. That article states that the practice of purgation by oath was unknown prior to 1641; that the earliest reported case bearing on the matter was decided in 1682, *King v. —*, Steward of —, T. Jones 178, 84 Eng. Rep. 1205 (1682); and that the doctrine was clearly and definitely put in a case decided in 1688, *Anon.*, Comb. 63, 90 Eng. Rep. 345 (1688). The doctrine was fully developed before the American Revolution, and was expounded in 4 BL. COMM. *287. The authors indicate the sudden demise of the doctrine in 1796, *Matter of Crossley*, 6 T.R. 701, 101 Eng. Rep. 780 (1796).

tural College Lands." The clarity of the explanation was not helped by the omission from the printed copy of seventeen words of the explanation as it appeared in the manuscript.¹¹ The note should have read as follows (emphasis added to indicate omitted words): "The form of conveyance for these lands in current use runs from 'the State of Missouri, grantor, represented by the Board of Curators of the University of Missouri, acting through the President of said Board,' but is signed '_____, President, Board of Curators of the University of Missouri.' The form of the conveyance results from the fact that the power to sell is in the board, but the deed is that of the State of Missouri, and the execution thereof is not by the board but by certain officers of the board designated by statute."

ADVERSE POSSESSION AND ADVERSE USER

*Zinser v. Lucks*¹² was concerned with the acquisition by adverse user of an easement to maintain a signboard on unfenced Ozark woodland. The case has been exhaustively considered in a note in a recent issue of the *Missouri Law Review*.¹³

STATUTES OF LIMITATION

Tax Titles — Three Year Limitation on Attack

Section 140.590, *Missouri Revised Statutes* (1949), provides as follows: "Any suit or proceedings against the tax purchaser, his heirs or assigns, for the recovery of land sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land was not subject to taxation, or has been redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed, and not thereafter; provided, that where the person claiming to own such land shall be an infant, or a person of unsound mind, then such suit may be brought at any time within two years after the removal of such disability." It probably is correct to say that most of the lawyers have assumed that a ten-year period of limitation applied in the case of a suit to set aside a collector's tax deed under the Jones-Munger act. However, dicta in several recent cases was to the effect that the three year period in Section 140.590 was applicable.¹⁴

11. Eckhardt, *Work of Missouri Supreme Court for 1950—Property*, 16 Mo. L. Rev. 374, n. 12, last par. (1951).

12. 235 S.W. 2d 844 (Mo. 1951).

13. O'Neal, *Property—Adverse User—Claim of Right—Actual Knowledge of Owner—Appellate Jurisdiction—Ejectment Against Non-Possessor*, 17 Mo. L. Rev. 103-107 (1952).

14. *Bussen Realty Co. v. Benson*, 349 Mo. 58, 66, 159 S.W. 2d 813, 819 (1942); *United States v. Certain Land, Etc.*, 70 F. Supp. 730, 732 (E.D. Mo. 1947); *Harrison v. Coomber Realty & Inv. Co.*, 359 Mo. 862, 865, 224 S.W. 2d 63, 64 (1949).

Two cases decided in 1951 hold that this section is applicable to a collector's tax deed under the Jones-Munger act. In *Granger v. Barber*,¹⁵ a suit to cancel and set aside a collector's tax deed under the Jones-Munger act was held barred three years after the tax deed was recorded. The court recognized as an exception that this section does not apply where the tax deed is "void on its face," but the court could not consider whether the exception was applicable because the particular tax deed was not before the court. The court held that it was not material that the persons attacking the tax deed were remaindermen; the three year bar applies. The court briefly reviewed the history of the section in question. *Pettus v. City of St. Louis*,¹⁶ in Division No. 2, has a much more extended tracing of the history of this section. In this case the three year bar of the section was applied to a suit to quiet title and cancel certain collector's tax deeds under the Jones-Munger law, and *Granger v. Barber*, decided in Division No. 1, was cited and approved.

What is the significance of these two cases with reference to marketability of title under a tax deed where the grantee has not quieted title? These cases indicate that the purchaser under the tax deed has a much stronger position defensively than it was assumed previously that he had. On the other hand, a collector's tax deed of record for three years cannot be passed by a title examiner. There are the express exceptions stated in the section itself. There is the problem (since 1945) of the naming of the owners in the notice of sale, as required by *Missouri Constitution*, Article 10, Section 13 (1945), and *Missouri Revised Statutes*, Section 140.150 (1949). There is the case of *Liese v. Sackbauer*,¹⁷ where a collector's tax deed under the Jones-Munger act recorded in 1937 was set aside in a suit commenced in 1945, *eight* years later, on the ground the price was so inadequate as to constitute fraud, even though the court had in view the special three year limitation statute;¹⁸ in this case there were special circumstances giving rise to an estoppel against the purchaser under the tax deed. There must be many more cases before a title examiner can determine how far he can rely on the three year bar of Section 140.590 in passing a title under a tax deed.

15. 236 S.W. 2d 293 (Mo. 1951).

16. 242 S.W. 2d 723 (Mo. 1951).

17. 222 S.W. 2d 84, 85, 87 (Mo. 1949).

18. The opinion as printed cites Mo. REV. STAT. § 11117 (1939), but clearly this should be § 11177, now Mo. REV. STAT. § 140.590 (1949). As a consequence of this error, *Liese v. Sackbauer* is not included in the annotations to V.A.M.S. § 140.590, nor is the case cited to the correct section in SHEPARD'S MISSOURI CITATIONS.

RECORDING ACTS

Marketable Title of Record

*Rudisaile v. De Beughem*¹⁹ was a case where a short, informal written contract for the sale of land provided that the vendor was to furnish the purchaser with an "abstract of title brought down to date," but where the vendor in her suit for specific performance tried the case on the theory the contract called for an abstract showing record title in the vendor. The abstract furnished showed title in one Swagger, and a 1943 warranty deed from Swagger to the vendor, recorded in 1943. It also showed a 1936 trust deed from Swagger to Trust Co., recorded in 1945. Whether the vendor took title free and clear of any rights of the Trust Co. depended on whether she had "actual notice"²⁰ of the then unrecorded trust deed. The court held that inasmuch as there was nothing in the abstract with reference to actual notice, the abstract did not show record title, and of course the requirement of such an abstract could not be met by vendor's testimony at the trial that she was in good faith and without notice. It is to be doubted whether such testimony would be sufficient to establish simply a marketable title, in view of the fact that the Trust Co. was not a party to the suit in which the testimony was given.

Soldiers' and Sailors' Civil Relief Act

The Soldiers' and Sailors' Civil Relief Act of 1940²¹ created many problems with reference to real property. The act remained in force through January 25, 1948.²² The act was revived June 24, 1948, and continues in effect.²³ It is not clear whether the revival left a gap of about five months when no act was in effect, or whether the act was revived retroactively and relates back to January 25, 1948, so that there was no gap but only a continuation.

A particularly difficult problem has been how far the protection of the act is extended to the holder of an unrecorded interest. *Godwin v. Gerling*²⁴ is a leading case construing the section of the Soldiers' and Sailors' Civil Relief Act dealing with foreclosure of mortgages and deeds of trust. The

19. 237 S.W. 2d 166 (Mo. 1951).

20. Mo. REV. STAT. § 442.400 (1949).

21. Act Oct. 17, 1940, c. 888, 54 Stat. 1178, as amended; 50 U.S.C.A. App. § 501 *et seq.*

22. Act Oct. 17, 1940, c. 888, § 604, 54 Stat. 1191, 50 U.S.C.A. App. § 584, is the basic provision for termination of the act. Joint Res. July 25, 1947, c. 327, § 4, 61 Stat. 454, 50 U.S.C.A. App. § 584, note, declares that the present war [World War II] shall be deemed to have terminated July 25, 1947.

23. Act June 24, 1948, c. 625, Title I, § 14, 62 Stat. 623, 50 U.S.C.A. App. § 464.

24. 239 S.W. 2d 352, 359 (Mo. 1951).

court held that in view of Sections 442.020, 442.150, 442.380-442.400, *Missouri Revised Statutes* (1949), insofar as bone fide purchasers are concerned, a grantee under an unrecorded deed has neither legal nor equitable ownership, but has only an "equitable claim;" consequently the land is not "owned" by such grantee and such grantee is not under the section of the Soldiers' and Sailors' Civil Relief Act dealing with mortgage foreclosures and sales under powers in deeds of trust. The decision reached a correct result, particularly in view of elements of estoppel present in the case. A much harder case would be where military service was the basic cause of the failure to record. It may be noted further that the Supreme Court of the United States could adopt a different meaning of the word "owner" as used in the act. The holding and ramifications of the principal case are exhaustively analyzed in a note by Miss Mary Gibson published elsewhere in this issue of the *Review*.²⁵

ESCROWS

Escrow Holder's Liability for Mistake

In *Marvel Industries v. Boatmen's Nat. Bank*,²⁶ an escrow holder was held absolutely liable where it paid over \$16,000 for forged bills of lading, even though the escrow holder exercised reasonable care, where the contract provided for payment to the seller on "presentation to said Bank of the original Bills of Lading from the railroad." The court held that this language clearly meant true original bills of lading, not forged ones, and that the escrow holder was bound to perform the duties voluntarily assumed. It would seem that the same principles would apply to an escrow holder in a real estate transaction and that he might find himself in the position of a guarantor of the genuineness of signatures on deeds, deeds of trust and notes when he pays over money deposited with him.

Risk of Loss of Deposited Funds

In 1925 when an editor of American Law Reports wrote an annotation, "Who bears loss of funds while in hands of escrow agent,"²⁷ he found only one reported decision, *Hildebrand v. Beck*.²⁸ When that annotation was superseded in 1951 by a new annotation, "Who must bear loss resulting from defaults or peculations of escrow holder,"²⁹ there were cases from only four states, but the editor was able to state as a general rule the following:

25. *Infra*, p. 471.

26. 239 S.W. 2d 346 (Mo. 1951).

27. 39 A.L.R. 1080 (1925).

28. 196 Cal. 141, 236 Pac. 301, 39 A.L.R. 1076 (1925).

29. 15 A.L.R. 2d 870 (1951).

"Whatever may be concluded with respect to the nature of an escrow agency, it is certain that it is peculiar in that the rights, duties, and liabilities of all the parties, including the escrow holder, may shift with the progress of the transaction, and are dependent upon the terms of the agreement and instructions given. Where a loss is caused by a wrong of the escrow holder, therefore, its assumption, as between the parties for whom he acts, must depend upon the status of the transaction at the time the wrong takes place, conceding that this result may be altered by the operation of other doctrines applicable to any agency, such as estoppel, waiver, ratification, and the like. Speaking generally, it has become well settled that a loss occasioned by the default, speculation, or similar wrong of an escrow holder, must, as between the parties to the escrow transaction, be borne by the one who, at the time of its occurrence, was lawfully entitled to the right or property affected."

There seems to be no reported Missouri case on civil aspects of the problem, but a 1951 criminal case, *State v. Nelson*,³⁰ sheds some light. That case involved the typical contract for the sale of land where the advance payment was deposited with the broker, with the usual provision for abstract, title examination, curing of defects, and closing by concurrent delivery of deed and payment of the balance of the purchase money. The broker, who was the escrow holder of the advance payment, was prosecuted for embezzling money belonging to the vendor. The broker contended that he was entitled to a directed verdict because the evidence showed that the money belonged to the purchaser inasmuch as the embezzlement occurred at a point of time prior to the closing of the transaction. In affirming the conviction the court stated: "There can be no doubt under the evidence that [vendor] had a qualified, special or constructive ownership in the \$3,000 at the time of the embezzlement." The court states further that when the transaction was closed "the loss because of this embezzlement fell upon the [vendor]."

The statement in *State v. Nelson* that the loss fell upon the vendor seems to be simply a statement of fact, and is not necessarily a statement as to where the loss should fall. If the vendor's ownership at the time of embezzlement was "special," then it would seem to follow that the purchaser's ownership was "general" and that he should bear the risk of loss. On the other hand, the court might hold that the loss should fall on the vendor in view of his special ownership and the fact that he was primarily

30. 240 S.W. 2d 140 (Mo. 1951).

responsible for the selection of the escrow holder. It does not appear what happened as between vendor and purchaser so that the loss in fact fell on the vendor. In the absence in Missouri of even a clear dictum as to risk of loss, the parties should make express provision in the contract covering the problem, or select a depository whose financial resources and integrity are beyond question.³¹

DELIVERY OF DEEDS — PRESUMPTION FROM ACKNOWLEDGMENT

It is elementary that a written paper in the form of a deed is not a deed until it is delivered.³² Proof of delivery ordinarily depends on parol evidence, and there is nothing in the record of a deed to indicate whether or not it was delivered. As a practical matter, if the date of recording is within a short time of the date of acknowledgment, the examining attorney presumes delivery. A lapse of any considerable period of time requires further investigation. If so much as a year has elapsed between the date of signing and acknowledgment, and the date of recording, Section 59.360, *Missouri Revised Statutes* (1949), provides that the recorder shall retain the original instrument for a year subject to the inspection of all parties interested. Another circumstance which frequently adds to the uncertainty as to whether there has been a delivery is the death of the grantor between the date of acknowledgment and the date of recording.

In a few states there are statutory provisions designed to cover the problem, e.g., Anno Laws Mass., Chapter 183, Section 5 (1933): "The record of a deed, lease, power of attorney or other instrument, duly acknowledged or proved as provided in this chapter, and purporting to affect the title to land, shall be conclusive evidence of the delivery of such instrument, in favor of purchasers for value without notice claiming thereunder." Who is a purchaser "without notice" under such a statute? If eight or nine years have elapsed between acknowledgment and recording and the grantor has died before the recording, does a subsequent purchaser have notice? Annotations to the particular section cited above give no answer.

31. As real estate sales frequently are handled, the purchaser signs the contract without advice of counsel. The purchaser should ask himself whether he would entrust the escrow holder with several thousands of dollars in a transaction not involving the purchase of real estate. The sale of the real estate tends to obscure the risk that is inherent in the deposit of money with the escrow holder. A somewhat similar situation arose at the beginning of World War II when many persons "traded in" their old automobiles on new automobiles to be delivered after the war. Actually the transaction was simply an unsecured loan to the dealer, but its basic elements were obscured by the "trade-in" features; apparently there were few or no losses.

32. See SHEPPARD'S TOUCHSTONE *58-59.

Wilcox v. Coons, considered by the court in 1949³³ and again in 1951³⁴ bears on the problem. The facts as developed in the first case were as follows. In 1938 Collins executed a warranty deed for a farm to strangers in blood, Wilcox and Truesdell, plaintiffs, for a recited one dollar and other valuable consideration. The deed was acknowledged before the scrivener, a lawyer, and was retained by the grantor, Collins. Collins continued to reside on the land and to pay taxes; he took out casualty insurance as sole owner; he told a nephew, Temple, one of the defendants, and others, that he would devise the land to Temple. In 1944 and again in 1945 Collins executed identical wills naming Temple as his residuary devisee. Collins died in January, 1947; the only land he had was the land described in the deed. The 1938 deed was recorded in April, 1947, three months after the grantor's death and nine years after it had been executed. In an action to determine title and in ejectment, where there was no evidence as to delivery, as to who had possession of the deed after the grantor left the scrivener's office with it, or as to who recorded the deed, the trial court directed a verdict for the grantee under the deed, but judgment was reversed on the theory that the issue of delivery should have gone to the jury. The plaintiff relied principally on the presumption of delivery of an *acknowledged* instrument under *Missouri Revised Statutes*, Section 490.410 (1949).³⁵ On the other hand Section 490.430 provides that the certificate of acknowledgment shall be rebuttable.³⁶ The court analyzes conflicting Missouri cases on the effect of such a presumption, and concludes that the presumption is really a statutory inference having inherent probative value. How much weight does the presumption have? The presumption is not so strong that evidence to overcome it must be clear and satisfactory, as several earlier Missouri cases had indicated. The presumption is stronger with lapse of time, or other unavailability of witnesses. The presumption with reference to *delivery*, which may not occur in the notary's presence and over which he had no official duty, is not as strong as the presumption that the notary acted properly in performing his official duty of taking the *acknowledgment*. On retrial there was

33. 359 Mo. 52, 220 S.W. 2d 15 (1949).

34. 241 S.W. 2d 907 (Mo. 1951).

35. The section itself does not mention delivery. It provides: "Every instrument in writing, conveying or affecting real estate, which shall be acknowledged or proved, and certified as herein prescribed, may, together with the certificates of acknowledgment or proof, and relinquishment, be read in evidence, without further proof."

36. "Neither the certificate of the acknowledgment nor the proof of any such instrument nor the record nor the transcript of the record of such instrument, shall be conclusive, but the same may be rebutted."

full proof of delivery. It appeared that several months after the scrivener had prepared the deed and had taken the acknowledgment, the grantor took the deed to another attorney who fully explained to the grantor the law regarding delivery at death by way of escrow, that in such case the deed could not be revoked, etc. The grantor left the deed with the attorney who put it into an envelope on which he wrote: "2-23-39. To be delivered when Tuck dies, with no power of recall," and put it in his safe, and forgot about it. The deed was discovered three months after the grantor died, and was delivered to the grantees who promptly recorded. The issue of delivery went to the jury, and judgment on their verdict finding delivery was affirmed.

Escrows with provision for delivery at death are valid and are fairly common, but they invite litigation and do not leave the record in a satisfactory condition unless the escrow agreement is in writing, is acknowledged and is recorded. The alternative technique of an immediately delivered and recorded conveyance to the grantee reserving a life estate in the grantor is much to be preferred from the point of view of the record, as only proof of the death of the grantor is necessary to clear title in the grantee. The latter technique has a further advantage in that it more clearly impresses the grantor with the fact that he is taking an irrevocable step. It would seem that both techniques are used entirely too often in cases where it would be to the grantor's interest not to make a present conveyance but to let his property pass by will or intestate descent. If the owner is determined to make a present disposition of his property, a trust, with ample provision for the grantor to draw on the principal, usually is preferable.

FUTURE INTERESTS — CONTINGENT REMAINDERS — ALIENABILITY

*Ott v. Pickard*³⁷ held that a contingent remainder limited to the heirs of a life tenant could be conveyed by a presumptive heir to the life tenant by a quitclaim deed containing a special recital, "This deed is made to clear title to the above described lands owned jointly by grantors and grantee." Under the authority of *Grimes v. Rush*³⁸ the remainder would have passed under a simple quitclaim deed. The case has been ably analysed in a recent issue of the *Missouri Law Review*.³⁹

37. 361 Mo. 823, 237 S.W. 2d 109 (1951).

38. 355 Mo. 573, 197 S.W. 2d 310 (1946). This case is discussed in Gibson, *Real Property—Contingent Remainders—Alienability*, 12 Mo. L. Rev. 218-221 (1947); Eckhardt, *Work of Missouri Supreme Court for 1946—Property*, 12 Mo. L. Rev. 405, 415 (1947).

39. Stocker, *Property—Contingent Remainders—Alienability*, 16 Mo. L. Rev. 331-333 (1951).

TAXATION

ROBERT S. EASTIN*

The cases decided by the Missouri Supreme Court during 1941 on the subject of taxation, were, as usual, not numerous. With the addition of some cases involving closely related problems of law, they may be summarized as follows:

I. PROPERTY SUBJECT TO TAXATION

For many years the taxability of the properties of the YMCA in St. Louis have been the subject of litigation.¹ Three times the supreme court held that property owned and used by the YMCA was taxable but on the fourth attempt² the court decided that YMCA's use was for purposes purely charitable and that the properties were exempt from taxation, notwithstanding the rental of rooms, the presence of a restaurant or cafeteria open to the public and the operation of a barber shop, tailor shop and the like. This last decision was consistent with and based largely on *Salvation Army v. Hoehn*,³ decided in 1945, which took a good deal broader view of "purposes purely charitable" than that taken in the earlier YMCA cases. The court was further faced with the problem of *res judicata*, in view of the previous YMCA litigation, but held that the earlier decisions were not binding since to apply the rule of former adjudication would result in applying one rule of taxability to the properties of the YMCA and another rule to the properties of others. The court went further however and intimated that in tax cases generally the rule of *res judicata* was hardly more than a rule of *stare decisis* with respect to taxes for another year.

A large tract of unimproved land owned by the St. Louis Boy Scouts and kept largely in its natural state for camping, hiking, nature study and the like, is used for purposes purely charitable.⁴ Property does not have to be used to capacity to be entitled to exemption so long as whatever use is made is charitable and so long as no private or non-charitable use is permitted or made.

II. LEVY AND ASSESSMENT OF GENERAL PROPERTY TAXES

A reorganized school district which includes within its boundaries an unincorporated town, is in the class of "school districts formed of cities and

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1. State *ex rel.* Koeln, Collector v. St. Louis Y.M.C.A., 259 Mo. 233, 168 S.W. 589 (1914); State *ex rel.* St. Louis Y.M.C.A. v. Gehner, 320 Mo. 1172, 11 S.W. 2d 30 (1928); St. Louis Y.M.C.A. v. Gehner, 329 Mo. 1007, 47 S.W. 2d 776 (1932).

2. Young Men's Christian Association v. Sestric, 242 S.W. 2d 497 (Mo. 1951) (*en banc*).

3. 354 Mo. 107, 188 S.W. 2d 826 (1945) (*en banc*).

4. St. Louis Council, Boy Scouts of America v. Burgess, 240 S.W. 2d 684 (Mo. 1951) (*en banc*).

towns" and entitled to levy a tax for school purposes of \$1.00 per \$100.00 valuation without a vote of the people under Section 11(b) of Article X of the *Constitution* of 1945.⁵ The constitutional provision was construed as not being limited to incorporated communities. After reaching this conclusion, and perhaps unnecessarily, the court held that, to the extent that Section 165.010, *Missouri Revised Statutes* (1949), classifies school districts by reference to incorporated cities and towns, it is unconstitutional. The statutory classification of school districts has no direct bearing on taxation and covers many aspects of school administration, etc. It need not necessarily conform to the constitutional classification of districts with respect to tax limits although, of course, this is probably desirable from a practical standpoint.

A notice of a special election to consider an increase in school taxes over the constitutional limitation is not invalidated by sending a letter to patrons of the school district asking support for the increased levy and stating, *inter alia* that the qualifications of voters could be established otherwise than by registration.⁶ The letter did not invalidate or affect the legal notice nor was there any evidence to support a charge that any person not qualified actually voted or that any person's ballot was illegally counted.

III. TAX SALES AND TITLES

The most interesting decisions of the year in the field of taxation were two separate cases,⁷ holding that Section 140.590, *Missouri Revised Statutes* (1949), barred a claim to set aside a tax deed issued under the provisions of the Jones-Munger Law on the ground of irregularities in procedure or inadequacy of consideration after three years from the date of filing the deed for record. Section 140.590 was first enacted in 1872 as part of the Act of that year providing for the administrative foreclosure of tax liens. In 1877 the provisions for administrative foreclosure were repealed and a system of judicial foreclosure substituted. What is now Section 140.590 was not specifically repealed but thereafter it was held not to apply to a judicial foreclosure, which continued in force until the adoption of the Jones-Munger Law in 1933. All this time Section 140.590 had been inoperative and, in fact, it was omitted from several of the Revised Statutes published during the interim. However, in 1951 it was resurrected, as it were, and held to apply to

5. *Vanlandingham v. Reorganized School District R-IV of Livingston County*, 243 S.W. 2d 107 (Mo. 1951).

6. *Cooper v. School District of Kansas City*, 239 S.W. 2d 509 (Mo. 1951).

7. *Granger v. Barber*, 236 S.W. 2d 293 (Mo. 1951); *Pettus v. City of St. Louis*, 242 S.W. 2d 723 (Mo. 1951).

deeds made under the Jones-Munger Law which was adopted 56 years after the earlier administrative foreclosure provision had passed into limbo.⁸

The problems incident to proceedings to set aside tax deeds on the ground of gross inadequacy of consideration, etc., were demonstrated in a number of cases. Thus, in *Hart v. Parrish*,⁹ a widow who was in possession of real estate and had an interest therein as "election dower" was entitled to set aside, as to her interest, a sheriff's deed upon tax sale issued several years prior to her husband's death. It was held that her inchoate dower interest during her husband's lifetime coupled with her subsequent possession gave her a standing to attack the tax deed. *Scott v. Unknown Heirs of Solomon Garrison*,¹⁰ and *Shaw v. Armstrong*,¹¹ involved the rights of claimants under unrecorded deeds to set aside tax deeds issued under the Jones-Munger Law. The *Scott* case held that such a claimant could not attack the tax deed where he was not in possession, but in the *Shaw* case it was held that an unrecorded deed plus possession was sufficient. The *Shaw* case also held that Section 140.410, *Missouri Revised Statutes* (1949), (a part of Jones-Munger Law) requiring that where a certificate of purchase is issued upon a tax sale, a deed must be issued and placed of record within four years from the date of sale, applied to a sale made under Section 140.250, which specifically provides for no certificate of purchase. This ruling certainly strains the wording of the statute although it seems to be within its general intentment.

Where a suit under the Land Tax Collection Act applicable to Jackson County is dismissed as to a parcel of land, the holders of special tax bills against the tract, who had brought suit on their bills before the Act took effect, which suits remained pending but untried until the dismissal, could thereafter prosecute the suits to judgment although during the pendency of the action under the Act the only means of enforcement was in the latter action.¹² In this case the Land Tax Collection Act proceeding was dismissed as to the parcel of land involved apparently as the result of a compromise of back general taxes. The validity of this dismissal was in issue here and the decision should not be deemed as approval of "compromises" during the pendency of a proceeding under the Act.¹³

8. *Supra*, n. 7.

9. 244 S.W. 2d 105 (Mo. 1951).

10. 235 S.W. 2d 372 (Mo. 1951).

11. 235 S.W. 2d 851 (Mo. 1951).

12. *Buchanan v. Cabiness*, 245 S.W. 2d 868 (Mo. 1951) (*en banc*).

13. *Collector of Revenue v. Parcels of Land Encumbered by Delinquent Taxes*, 247 S.W. 2d 83 (Mo. 1952) (*en banc*).

Where general taxes on land held in trust were enforced judiciously in a suit against a trustee and all of the beneficiaries, who appeared and filed answers, and in which no irregularity appeared or with respect to which no fraud was alleged, and where the property was sold to a stranger, the judgment of foreclosure and the deed pursuant thereto cannot be set aside on the ground that the whole proceeding was a scheme to break the trust.¹⁴ The principal ground for the decision was equitable estoppel but some emphasis was placed upon the fact that the real estate was sold to a stranger although he, in fact, appears to have been merely a conduit who conveyed back to the trust beneficiaries free of the trust.

IV. TAXING DISTRICTS

A. School District

Several more cases were decided under the recent School Reorganization Law.¹⁵ The following propositions were established:

1. Where a proposed reorganized school district lies in two counties, notice of the election need not be published in newspapers in both counties, at least without proof that someone was misled.¹⁶

2. In view of Section 165.677, *Missouri Revised Statutes* (1949), requiring the submission of certain reorganization proposals to the voters on the first Monday in November, 1949, no formal call of the election was required and informalities and irregularities in the published notice of election would not be deemed to invalidate the election without proof that someone was actually misled.¹⁷

3. A county reorganization plan is valid and complies with the statute although it may leave some large city or consolidated districts, which meet all of the standards of reorganized districts, unchanged.¹⁸

The organization of a consolidated school district incorporating part only of a common school district is invalid where the part of the latter district not so included contains less than the statutory minima of twenty school children of school age and either eight square miles of land or an assessed valuation of \$50,000.¹⁹

14. *Roach v. Kohn*, 235 S.W. 2d 284 (Mo. 1951).

15. MO. REV. STAT. §§ 165.657-165.707 (1949).

16. *State ex inf. Latham ex rel. Dawes v. Allen*, 237 S.W. 2d 489 (Mo. 1951).

17. *State ex rel. Stipp ex inf. Stokes Mound School District No. 7 v. Colliver*, 243 S.W. 2d 344 (Mo. 1951); *State ex inf. Mayse v. Goodwin*, 243 S.W. 353 (Mo. 1951).

18. *State ex inf. Mayse v. Goodwin*, *supra*, n. 17.

19. *State ex inf. Taylor ex rel. Borgelt v. Pretended Consolidated School District No. 3 of St. Charles County*, 240 S.W. 2d 946 (Mo. 1951). If the area is small (e.g. 293 acres) and contains no children of school age, the exclusion may

B. Cities

In 1950 the annexation by Kansas City of a large area in Clay County was upheld.²⁰ In 1951 the court considered a proposal to de-annex this same area and unanimously concluded that the city did not have to submit the de-annexation program to the voters.²¹ There were three opinions but in substance four judges concurred upon the theory of *res judicata*, in the absence of proof of changed conditions since the trial of the earlier case, while a separate majority of four judges (Judge Conkling concurring in most of both positions) went upon the theory that the evidence disclosed no reason for the de-annexation and that, on the record, the de-annexation proposal was, in fact, unreasonable and the submission could have been enjoined, if necessary.

The dis-incorporation of a fourth class city under the terms of Section 79.490, *Missouri Revised Statutes* (1949), depends only upon (1) a petition which is in fact signed by two-thirds of the legal voters of the city, and (2) the publication of notice as prescribed in the statute. The question of the reasonableness or propriety of the dis-incorporation is not the subject of judicial review.²²

C. Other

The provisions of what is now Section 247.170 1. (9), *Missouri Revised Statutes* (1949), to the effect that upon purchase by a city of a part of a water supply district located in an area annexed by the city, the proceeds, after payment of the bonds of the district, should be distributed among and for the benefit of the persons owning the land within the water supply district at the date of the purchase by the city and providing for the appointment of a trustee to distribute the same, are unconstitutional as a grant of public money to private persons in violation of Article III, Section 38 and Article VI, Section 25 of the *Constitution of Missouri*, 1945, at least so long as the district remains in existence as a public corporation.²³

V. MISCELLANEOUS

The City of St. Louis has authority to enter into a "Co-operation Agreement" for the furnishing of city services to the housing projects of the St.

be ignored on the ground of de minimis. See e.g. *State ex inf. Kamp ex rel. Rogers v. Pretended Consolidated School District No. 1*, 359 Mo. 639, 223 S.W. 2d 484 (Mo. 1949) (*en banc*).

20. *State ex inf. Taylor ex rel. Kansas City v. North Kansas City*, 228 S.W. 2d 762 (Mo. 1950) (*en banc*).

21. *Hixson v. Kansas City*, 239 S.W. 2d 341 (Mo. 1951) (*en banc*).

22. *In re City of Kinloch*, 242 S.W. 2d 59 (Mo. 1951).

23. *State ex rel. Public Water Supply District No. 7 of Jackson County v. James*, 237 S.W. 2d 113 (Mo. 1951) (*en banc*).

Louis Housing Authority and for the payment of a percentage of rentals to the city in lieu of ad valorem taxes.²⁴

TORTS

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An unusual number of new situations involving possible tort liability was passed upon by the court during the year under review. They indicate the ever expanding area of this field of law. The humanitarian cases have been discussed elsewhere in the *Review*.†

I. NEGLIGENCE

A. Duties of Persons in Certain Relations

1. Possessors of Land

In two decisions the plaintiffs failed to establish duties which they alleged the possessor of the premises owed them. In *Walters v. Markwardt*,¹ the plaintiff alleged that he was injured by falling into an unguarded grease pit adjacent to the driveway of a filling station while attempting to reach a public restroom therein late at night. It did not appear that he was on the premises as a customer or a prospective customer or during business hours. Though the driveway was used as a walkway by the public to enter upon the premises and those adjacent thereto, the plaintiff was intentionally deviating from the driveway for his own purposes and not for any purpose or benefit of the defendants. The court stated that persons are not usually invited to such premises when they are not open for business. The plaintiff had sought to predicate his case on the theory that this was an apparent extension of a public highway dedicated as such by the defendants' maintenance of it so that they owed the plaintiff the same duty as though it were actually a public highway. The petition was held not to state a cause of action.

A judgment was entered on a directed verdict for the defendant in *Oliver v. Oakwood Country Club*,² on the ground that, although the plaintiff was an invitee on the defendant's premises, the evidence failed to show defendant's knowledge of a dangerous condition. There the action was against

24. *St. Louis Housing Authority v. City of St. Louis*, 239 S.W. 2d 289 (Mo. 1951) (*en banc*).

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†Becker, *The Supreme Court and the Missouri Humanitarian Doctrine in the Years 1950 and 1951*, 17 Mo. L. REV. 52 (1952).

1. 361 Mo. 936, 237 S.W. 2d 177 (1951).

2. 245 S.W. 2d 37 (Mo. 1951).

a golf club for injuries to the plaintiff who was shot by another boy when they with others were seeking employment as caddies. The court recognized that a possessor of premises, if present, may owe a duty to control the conduct of a third person, for example another invitee, when he knows or should know that the exercise of his control of the third person is necessary to prevent harm. There was no evidence, however, tending to show that the defendant had ever theretofore permitted the possession or was apprised of any practice of the possessing or the using of firearms or air rifles on any part of the country club premises. Since the boys had not as yet entered into an employer-employee relationship with the defendant, liability could not be predicated on a theory of duty to provide the plaintiff with a safe place to work nor could the defendant be held responsible for the act of the boy firing the gun upon the theory of *respondeat superior*.

The attractive nuisance doctrine in Missouri is not applicable if the danger is not inherent in the instrumentality or condition causing injury to children but instead arises from casual negligence. In *Holifield v. Wigdor*,³ the action was for the wrongful death of plaintiff's son, approximately five years of age, as a result of drowning in a water-filled excavation on residential property. The plaintiffs theory was that the installation of two small gas tanks as part of a gas furnace for a residence, a water-filled excavation for the installation of the large gas tank, and the large tank situated adjacent to the excavation "created an inherently dangerous condition to children of the age of such deceased child" because the tanks were bright and shiny and could be easily seen from the adjacent street and "that the tanks, their appearance, their location, the fresh dirt, the water in the hole, and the area in and about such hole became naturally attractive to such deceased child." The court held that this evidence failed to show such conditions were inherently dangerous and thus did not constitute a dangerous and attractive nuisance. Furthermore, the water-filled hole was a temporary condition which "cannot come within the classification of nuisance," and the failure to place a fence or barricade around the hole "was not more than 'mere casual negligence,' and not evidence sufficient to establish that defendant *maintained* an attractive nuisance." Since a submissible case was not made, any error in giving certain instruction for the defendant was immaterial.

2. Lessor-Lessee Relationship

The question on appeal in *Allbritton v. Property Servicing Co.*⁴ was whether the trial court was justified in directing a verdict for the defendants.

3. 361 Mo. 636, 235 S.W. 2d 564 (1951).

4. 361 Mo. 1041, 238 S.W. 2d 401 (1951).

The landlord-defendant through its agent had placed a marble slab and flower box on banisters over a basement stairway to improve the appearance of the property. When the plaintiff tenant stepped from an unused but unfastened door above onto the slab to repair a screen the slab broke, precipitating the plaintiff to the basement. Although no steps led from the slab to the basement and it was to serve some other purpose, yet if the slab was placed in a position that an ordinary person was likely to step upon it, and in so doing the landlord negligently created a hazard he would, absent contributory negligence, be liable. The court held that the case should have been submitted to the jury.

3. Railroads and Other Carriers

A case of first impression in Missouri is *Reed v. Missouri-Kansas-Texas R.R.*,⁵ in which the court *en banc* held that where a railroad company furnished a flat car for the shipment of power line poles and the loading of the flat car was done by the consignor, stakes selected and used by the consignor in loading poles on the flat cars were not part of the railroad car equipment. Therefore, the railroad company was not liable for injuries sustained by the consignee or his employees when the stakes broke during the course of unloading, which was left entirely to the consignee. The court recognized a conflict in the authorities elsewhere, but concluded that the railroad after furnishing the car takes no part in the task of loading the poles on the car, except to say to the consignor that he must load the poles according to rules adopted by the railroad association. However, the court observed that these rules are in existence primarily for safety purposes while the car is being transported. After the car is loaded the railroad inspects the carload and determines if it is safely loaded for transportation. If it is, the car is accepted and transported to its destination where it is placed at a convenient place to be unloaded. In unloading the car the railroads have no rules as this task is left entirely to the consignee who is just as competent to determine whether the stakes alone are sufficient to hold the load of poles after the steel bands and wires are cut as are the employees of the railroad. The court approved the reasoning of another case: "It is undisputed that, in the loading of poles of the character of those in this instance, new and different stakes have to be used with each load; the stakes being destroyed with the unloading. Under these circumstances it could hardly be held that an insufficient number of stakes, or stakes inferior in quality, could constitute a defect in the car itself. They were not parts of the car, and the car could be

5. 239 S.W. 2d 328 (Mo. 1951).

used for the purpose of hauling other classes of freight, with different stakes, or without any stakes whatever.'"

An interesting observation of what may be required of a motorman under an ordinance, as compared to his duty of care under the humanitarian doctrine, was made in *Abernathy v. St. Louis Public Service Co.*⁶ This was an action by the occupant of an automobile against a streetcar company for injuries sustained in a head-on collision. The negligence submitted to the jury was a violation of what is known as the vigilant watch ordinance which required the motorman to keep a vigilant watch at all times, and if he had done so he was bound to have seen the automobile in which the plaintiff was a passenger when it first started to go upon the tract. After observing "that to look is to see," the court said that "this ordinance also required the motorman to stop upon the first appearance of danger in the shortest time and space possible. It required more of this motorman than would be required under our humanitarian doctrine. Under that doctrine he is not required to act until the person or vehicle comes within the danger zone, but under the vigilant watch ordinance he is required to act upon the first appearance of danger. In other words, the motorman should have started to stop the streetcar when the automobile was approaching the danger zone." The court also pointed out that "if the automobile was already upon the track at a distance so far from the streetcar that there could be no possible danger, the motorman need not have stopped, but he must stop the streetcar when it first became apparent that the automobile might continue to be driven on the track into the danger zone, that is to say, while he had ample time and space to stop the streetcar before it can run into the approaching automobile that is on the track."

The action in *Fortner v. St. Louis Public Service Co.*⁷ was by an infant for injuries received when he was struck by the defendant's streetcar loaded with children as the streetcar started forward from a regular stop at a street intersection where the plaintiff with three or four other children had alighted from the rear exit door. The plaintiff had walked from the safety zone directly in front of the streetcar. From his normal seated operating position, which was three feet from the windshield, the operator could not have seen a child of the plaintiff's height if the child were standing closer than seven feet to the front of the streetcar. The operator had not bothered to lean forward to see how near to the front end of the car he could observe objects such as small children crossing the tracks, although he had just discharged three or

6. 240 S.W. 2d 914 (Mo. 1951).

7. 244 S.W. 2d 10 (Mo. 1951).

four other children at this regular stop. The court said it was quite clear that if the operator, before he started the forward movement, had put himself in a position to see, he, in looking, would have seen the plaintiff standing there. The court held that in a primary negligence case it is sufficient if the jury is authorized under instructions to find that the defendant was negligent specifically in failing to keep a proper lookout, or that defendant was negligent in starting a streetcar without exercising ordinary care to keep a reasonable lookout ahead, and that such negligence directly caused plaintiff's injuries. It was unnecessary in a primary negligence case to submit the further hypothesis that by keeping a proper lookout the defendant could have seen the plaintiff.⁸

8. Other cases involving the liability of carriers for personal injuries do not raise legal problems of sufficient importance to be noted fully. In *Beahan v. St. Louis Public Service Co.*, 361 Mo. 807, 237 S.W. 2d 105 (1951) (*en banc*), an order for a new trial was affirmed in a passenger's action for injuries sustained while alighting from a motor bus, where an instruction was given that if the operator of the motor bus did not and by the exercise of the highest degree of care could not have seen the defect in the sidewalk, or having seen such defect would not have considered it to be dangerous. The court held that the standard, by which conduct of a person in a particular situation is to be judged in determining whether he is negligent, is care which a reasonable and prudent man would be expected to exercise under the same or similar circumstances.

In *Abernathy v. St. Louis-San Francisco Ry.*, 237 S.W. 2d 161 (Mo. 1951), evidence that a locomotive fireman while on duty climbed on the engine and, while walking on the running board toward the automatic bell ringer for purposes of repair, stepped on some foreign object lying on the running board, slipped and fell, that the surface of the running board was slick, and that the metal strip at the outer edge of the running board which normally extended above the surface of the board was loose and sagging was held sufficient to sustain a verdict both as to the defect in the appliance and a contributing cause of the plaintiff's injuries within the Federal Boiler Inspection Acts.

Thompson v. Thompson, 240 S.W. 2d 137 (Mo. 1951) (*en banc*), was an action by a hostler against the railroad for injuries sustained when the hostler while shaking grates slipped on the engine's deck or apron which was allegedly slick and slippery by reason of oil on the apron. The evidence was held to be insufficient to show that the oil got on the apron through agency of any employee or that the railroad had actual or constructive notice of the presence of oil.

In *Timmerman v. Terminal R.R. Ass'n of St. Louis*, 241 S.W. 2d 477 (Mo. 1951), in an action by a switchman under the Federal Employers' Liability Act for injuries sustained when the switchman, without looking, alighted from the switch engine and was struck by a rapidly moving locomotive which appeared on a parallel track without signal or warning from the switch engine crew, evidence was sufficient to make a submissible case on the issue of whether there was a custom among members of switching crews to warn brakemen at that particular switch of approaching trains. Failure to observe that custom was a breach of duty. Furthermore, the custom had continued long enough to become a practice establishing knowledge on the railroad of the unsafety of the place of work. In *Higgins v. Terminal R.R. Ass'n. of St. Louis*, 241 S.W. 2d 380 (Mo. 1951), under the same Federal Act, the unsafe place of work submitted arose from water on a smooth concrete floor, causing the plaintiff-employee to slip and fall. Whether the water came from a leaky radiator, whether, because of the water the smooth concrete floor was not reasonably safe, and whether the railroad in the exercise of ordinary care should have known and remedied the unsafe condition were for the jury.

4. Automobiles

It was held in *Stokes v. Carlson*,⁹ where an automobile passenger's act of pushing forward the driver's seat, causing the driver to lose control of the automobile, occurred while the passenger was asleep, that the passenger was not liable for negligence since his act was not of his own volition. Movements of the body during sleep when the will is in abeyance and movements during periods of unconsciousness are not "acts" of the person for which there is legal responsibility. Neither could he be charged with negligence in going to sleep since he could not foresee that after he had fallen asleep the sudden movement of his body might throw the plaintiff against the steering wheel and thus endanger the occupants of the car. "Such an extraordinary occurrence," said the court, "is not within the realm of every day experience, and the mere fact that it happened in the present case is no indication that it was reasonably to be anticipated. The defendant was required to exercise foresight, not clairvoyance."

In *Burlingame v. Landis*,¹⁰ the court resolved an apparent conflict between earlier decisions in the Kansas City and St. Louis Courts of Appeals as to the construction to be placed on that portion of Section 304.010 of the *Missouri Revised Statutes*, 1949, which provides that: "Every person opera-

In *Luthy v. Terminal R.R. Ass'n. of St. Louis*, 243 S.W. 2d 332 (Mo. 1951), the alleged unsafe place to work submitted to the jury, which resulted in injuries to switching crew foreman when he tripped over switch operating mechanism in defendant's switch yards, was the black, unlighted mechanism on a dark night.

Before liability for personal injuries may be predicated on a violation of the Federal Boiler Inspection Act, where ice formed on the ladder on the rear of a locomotive tender causing locomotive fireman on an interstate train to fall from the ladder, it was error to omit from the instruction, in *Banta v. Union Pacific R.R.*, 242 S.W. 2d 34 (Mo. 1951), that the ice came from and was formed there by the steam which escaped from the leak under the tender. Mere ice or frost or snow which resulted solely from the normal operation of a steam locomotive during existing winter climatic conditions, and disconnected from other circumstances, would not create liability, even under the Boiler Inspection Act.

In *White v. Atchison, Topeka & Santa Fe Ry.*, 244 S.W. 2d 26 (Mo. 1951), plaintiff brakeman was injured in coupling a tank car to an engine when his big toe was caught in couplings of engine and tank car as he shoved the drawbar, to which the engine coupler was attached, into alignment with the tank coupler with his foot, as required for couplers to couple automatically. The evidence was held sufficient to take to the jury the questions of defendant's violation of the Federal Safety Appliance Act in that engine coupler was over four inches out of line. Evidence was also held sufficient on the alleged negligence of the engineer in failing to stop on signal from the plaintiff.

In *Blew v. Atchison, T. & S. F. Ry.*, 245 S.W. 2d 31 (Mo. 1951), the action was brought under the Federal Employers Liability Act for personal injuries sustained when plaintiff was thrown under a boxcar on defendant's railroad when his grip on the handrailing was allegedly broken by a sudden, violent jerk as a result of the unexpected application by the engineer of locomotive brakes.

9. 240 S.W. 2d 132 (Mo. 1951).

10. 242 S.W. 2d 578 (Mo. 1951).

ting a motor vehicle on the highway of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care. . . ." The terms "in a careful and prudent manner" and the "highest degree of care" are not synonymous. The court approved the interpretation in an earlier Kansas City Court of Appeals decision: "The 'highest degree of care' is that care which a very careful and prudent person exercises under the same or similar circumstances. . . . In other words, a person may operate an automobile in a careful and prudent manner and yet not in the same manner that a very careful and prudent person would do under the same conditions." In the principal case on an issue involving the sudden emergency doctrine, plaintiff's instruction containing both standards of care on the issue of contributory negligence was prejudicially erroneous.

In an action for injuries sustained by a five-year-old child when she was struck by an automobile driven by the defendant, it was held in *Scaggs v. Utrecht*¹¹ that an instruction to find for the defendant, if the child ran from behind a parked automobile into the path of the defendant's automobile when it was so close that the defendant could not prevent the accident by sounding a warning signal, was error in view of substantial evidence that if the defendant had kept a proper lookout she could have discovered the child long before the child stepped into the street, and where under the circumstances it was the defendant's duty to be on the lookout for children and to sound a timely warning before the child started across the street.

5. Aircraft

*Phillips v. Vrooman*¹² was an action for personal injuries sustained in an airplane crash through alleged negligence of the defendant pilot in failing to discontinue flight when the engine misfired. The trial court entered judgment for the defendant. On appeal by the plaintiff, the supreme court held that the giving of an instruction for the defendant which hypothesized the accident, mischance or misfortune as the sole proximate cause of the injury to the plaintiff, when the cause of the accident was known to be misfiring of the engine, was error, as the issue of negligence was in failing to discontinue the flight upon knowledge of the performance of the engine. The instruction was erroneous since specific issues of fact were presented. The cause of the accident was known to be the failure of the engine, and the jury had been instructed in accordance with plaintiff's theory that the pilot was negligent in continuing the flight upon becoming aware of the misfiring of the engine

11. 244 S.W. 2d 17 (Mo. 1951).

12. 361 Mo. 1098, 238 2d 355 (1951).

and while still able to land on the runway. Likewise, an instruction for the defendant that there would be no liability if defendants did not know nor in the exercise of reasonable care should they have known at the time the plane was taken off the ground that it was apt to crash, since it ignored the issue and circumscribed the submitted factual basis of the plaintiff's theory of recovery. The engine did misfire and "the question was — after the engine misfired, should and could defendants, in the exercise of due care, have discontinued the flight and brought the airplane to safety on the runway."

6. Municipal Corporations

In *Hays v. Kansas City*,¹³ the plaintiff was injured by a city truck while it was being backed down an alley to receive a load of debris from a high-loader which was cleaning the alley of filth and noxious refuse. The court distinguished the non-delegable duty of a city to construct and maintain streets in such condition that they will be reasonably safe for public travel from its governmental function of keeping the streets free from filth and noxious refuse. The court also held that Section 304.010 of the motor vehicle statute, which provides that every person operating a motor vehicle should drive in a careful and prudent manner and should exercise the highest degree of care, does not impose liability on a municipality for injury caused by a municipally owned motor vehicle while engaged in a governmental function, in view of Section 301.260, which provides that motor vehicles owned by the municipality are exempt from all provisions of the motor vehicle statute while being operated within the limits of the municipality.¹⁴

7. Supplier of Chattels

In *Winkler v. Macon Gas Co.*,¹⁵ the action by husband and wife against the gas distributing company and the Phillips Petroleum Company was for injuries arising when the plaintiff husband lit a match to light a gas hot water heater located in a house in which the plaintiff wife had rented a room, resulting in an explosion of propane gas. The gas distributing company ordered the propane gas from the defendant petroleum company. The gas, however, was manufactured by companies other than the defendant petroleum company and was consigned by the manufacturers in six tank cars of liquid petroleum from their plants in Texas, under uniform bills of lading, from the defendant petroleum company to the Macon Gas Company. The

13. 241 S.W. 2d 888 (Mo. 1951).

14. Other cases involving the liability of a municipal corporation for personal injuries are *Pohl v. Kansas City*, 238 S.W. 2d 405 (Mo. 1951), and *Jones v. Kansas City*, 243 S.W. 2d 318 (Mo. 1951). They present no new questions.

15. 361 Mo. 1017, 238 S.W. 2d 386 (1951).

petroleum company admitted that it was the vendor, but it was stipulated that the petroleum company was never in the physical possession of the product, the product having been consigned direct by the manufacturers to the Macon gas distributing company. The defendants' evidence shows that the liquid petroleum was odorized when it was placed in the tank cars. The bills of lading, prepared by the manufacturer-shipper, recited that one pound of Ethyl Mercaptan had been added to each 10,000 gallons of liquid petroleum. Under these circumstances, and since it was not the manufacturer and never had physical possession of the product, the Phillips Petroleum Company contended that it was under no duty to odorize. The court on appeal held that Phillips was neither a manufacturer nor a retailer of propane, but it was a vendor or supplier. However, there was no evidence that Phillips knew or had reason to know that the propane had not been odorized and was therefore dangerous to use; "upon the record as far as Phillips knew or 'had reason to know' all propane shipped to Macon was odorized." Therefore, the court held that the ground of negligence on the part of Phillips could be found "only by reason of a duty on its part to inspect the product, and it is not claimed, in the circumstances of this case and in the absence of knowledge of 'reason to know,' that any such duty arose or existed." A judgment in favor of the plaintiff against the Macon Gas Company was affirmed, and the judgment as to the Phillips Petroleum Company was reversed, the court ruling that a directed verdict in favor of the latter company should have been given.

8. Employer of Independent Contractor

A question new to Missouri law was decided in *Hammond v. City of El Dorado Springs*,¹⁶ where the action was for personal injuries sustained in a fall from a water tower. The plaintiff was an employee of an independent contractor which had contracted with the city to repair, alter and improve the water tower. The injuries resulted when spider rods from which the employee was suspended in the tower broke. The alleged negligence against the defendant city was in failing to warn the plaintiff of a dangerous condition existing in the premises which the defendant knew or should have known, at a time when the defendant could and should have anticipated injury to the plaintiff. More specifically, the dangerous condition complained of was the rusted, corroded and structurally defective condition of the spider rods. The court held that these facts fell within an exception to the general rule as to the liability of an owner of premises to an indepen-

16. 242 S.W. 2d 479 (Mo. 1951).

dent contractor and his employees. The contract undertaken here by the contractor was to repair this water tower. "This necessarily," said the court "included the repair of the spider rods since they were an 'integral' part of and a subsidiary part of the whole tower." The court reasoned that "before repairs of any kind can be made to a thing, it is first necessary to find out what is wrong with it. In other words, an inspection must be made of the thing to be repaired before any work is commenced, otherwise no repairs could ever be effected. Where one is engaged to repair something it necessarily implies that some defect exists. It is then the responsibility of the repairman to determine what that defect is. It does not follow that the person having the repairs made need inform the repairman what repairs are necessary unless he desires only one specific repair made. It is for this reason that we have experts or specialists in practically every field of endeavor, to tell us what is wrong and then remedy the defect."

B. Contributory Negligence

In *Thompson v. Byers Transportation Co.*,¹⁷ the plaintiff truck driver sustained injuries when his truck collided at night with the rear of the defendant's truck. If the lights of the defendant's trailer had been burning as required by the statute, there was evidence warranting a finding that they could have been seen for 100 to 200 feet. There was also evidence that the headlights of an oncoming truck also affected the plaintiff's vision. On these facts, it was held that plaintiff was not contributorily negligent, as a matter of law, on the theory that he was traveling through fog at excessive speed which prevented him from stopping within distance for which his headlights revealed objects ahead for him.

C. Humanitarian Doctrine

These decisions are considered in a separate article by Becker in 17 *Missouri Law Review* 32 (1952), entitled "The Supreme Court and the Missouri Humanitarian Doctrine in the years 1950 and 1951."

D. Burden of Proof

In the wrongful death action of *Price v. Schnitker*,¹⁸ an instruction was given for the defendant which was an elaboration upon a prior instruction as to the burden of proof: "Neither are you permitted to base a verdict entirely and exclusively on mere surmise, guesswork and speculation, and if upon the whole evidence in the case, fairly considered, you are not able

17. 239 S.W. 2d 498 (Mo. 1951).

18. 361 Mo. 1179, 239 S.W. 2d 296 (1951).

to make a finding that the defendant is liable without resorting to surmise, guesswork, speculation outside of and beyond the scope of the evidence and the reasonable inference deductible therefrom, then it is your duty to and you must return a verdict for the defendant." The court, in ordering a re-trial on other grounds, said that this elaboration should not be given although it was not held that the giving thereof constituted reversible error. The court repeated previous warnings that the more the instruction is elaborated on, the more complex it becomes and the more it is likely to be misunderstood.

In *See v. Wabash R. R.*,¹⁹ the defendants' instruction on the burden of proof told the jury at one place that "Preponderance of the evidence here used means evidence which you think is more worthy of belief than that offered *by defendants*." The court said "This is inaccurate and misleading. Substitution of the words 'in opposition to' for those we have italicized would have rendered the definition unobjectionable."

II. DECEIT

A petition, alleging that the landlord had induced tenant to vacate apartment to his damage by false representations to the tenant and to the area rent director that landlord desired possession of the apartment for his personal dwelling, resulting in the issuance of certificate authorizing eviction, was held, in *Bedell v. Daugherty*,²⁰ to state a cause of action against the landlord for fraud and deceit. The representation by the landlord as to the proposed use of the apartment for his personal dwelling constituted a representation of existing fact and was not merely as to future intentions.

WILLS, TRUSTS AND ADMINISTRATION

GEORGE W. SIMPKINS*

In this field, as usual, the Missouri Supreme Court was called upon to decide a large number of cases involving diverse legal issues. The most significant developments were in relation to procedural matters, where several relatively novel questions were decided, and the correct construction of wills and trusts, where familiar principles were further clarified.

19. 242 S.W. 2d 15 (Mo. 1951).

20. 242 S.W. 2d 572 (Mo. 1951).

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I. PROCEDURAL QUESTIONS

The case of *Capps v. Adamson*¹ involved, among other issues, the question of how to prove the execution of a will (which revoked a prior will) where the subsequent will had itself been later destroyed. The court ruled:

"... In our case one of the subscribing witnesses, Mooneyhan, was examined, but the identity of the other (purported) subscribing witness was not and, it seems, could not be shown because unknown, or at least unknown at the time of the trial. There are bases for the inference the will of July 31st was destroyed by Dr. Adamson with revocative intent. Anyhow, the inference is that the will of July 31st was either lost or destroyed. Obviously plaintiffs could not produce the second subscribing witness unknown to them, nor could the handwriting on the will of such unknown subscribing witness be directly proved, the will having been lost or destroyed.

"In a case where a will had been lost or destroyed by a burglary of a safety deposit box so that the handwriting of neither of the supposed subscribing witnesses could be proved, and one of the supposed subscribing witnesses only thought he had witnessed the will, and the other was dead, yet the proof of the lost or destroyed will as a valid instrument duly executed did not fail, there being other 'substantial' evidence—shown circumstances supporting the reasonable inference the will had been duly executed. The due execution of the will was necessarily proved by the best evidence procurable in the peculiar situation. *Charles v. Charles*, *supra*. See also *Harrell v Harrell*, 284 Mo. 218, 223 S. W. 919; *In re Rosencrantz' Estate*, 191 Wis. 109, 210 N. W. 371."

*Peterson v. Bledsoe*² was a suit to establish a lost will. The court upheld the ruling of the trial court that the evidence sustained a finding that testator had destroyed and revoked the will.

*State, ex rel., North St. Louis Trust Company v. Stahlhuth*³ determines that:

"... when a trust company (which has not complied with Section 363.700) is appointed executor in a will, it is entitled to qualify under the same circumstances as a natural person so appointed. That is, if nothing is mentioned about bond, it must give the bond required by Sections 461.260-461-280, R. S. 1949; but, if the will requests that it shall not be required to give bond as executor, then the Probate Court may issue letters without requiring bond or may in its discretion require bond under the pro-

1. 242 S.W. 2d 556 (Mo. 1951).

2. 241 S.W. 2d 375 (Mo. 1951).

3. 239 S.W. 2d 515, 518 (Mo. 1951) (*en banc*).

visions of Section 461.300. In other words, the Court has discretion as to requiring bond but does not have discretion as to issuing letters to a qualified executor who is appointed by a will and who is willing to serve.

"We also hold that it was proper for relator to make application for letters without giving bond (in which the principal beneficiary of this will joined); and that such application was sufficient for the Court to act on, either by issuing the letters without requiring bond or determining in its discretion to require bond. In short, application for letters in accordance with the direction of the will was all that was required of the named executor. Any question as to bond could thereafter be raised 'at the instance of any creditor or devisee' or by the Court of its own motion. The right of a testator to appoint an executor is an important right, and it is the policy of our law and code to respect it. . . ."

*Schupbach v. Fisler*⁴ is a case of considerable practical importance. It holds that an administrator pendente lite can, pursuant to order of the probate court, sell real estate to satisfy claims against the estate. It has been ruled that under the former statute such a sale was invalid.⁵ The court reviewed the changed situation presented by the present statute, and upheld the sale.

In *re Lipic's Estate*,⁶ further clarifies the law applicable to citations alleging concealment of assets.

"As above stated, it is not only abundantly established by the proof, but it is conceded that the respondent executors have never had *control, custody* or *possession* of any of the specific property claimed to have been embezzled and withheld from the Emma Lipic estate. If the respondents never had possession, custody or control of the specific personal property, then it follows, of course, that respondents did not dispose of such specific personal property. The evidence shows unequivocally that Joseph Lipic, Sr., during his lifetime did receive the money value of the claimed assets. The \$2500 in cash he returned to his two daughters, and he gave Leonard Lipic \$1250.00. In his testimony Leonard Lipic disclaimed all interest in or to any of the property in question here.

"Both parties rely on *State ex rel Lipic v. Flynn*, supra, and each contends that the *Lipic v. Flynn* case rules this case in their favor. There is no ambiguity in the *Lipic v. Flynn* opinion. Judge Ellison's opinion there reviewed and analyzed such cases as *In re*

4. 239 S.W. 2d 502 (Mo. 1951).

5. *Johnson v. Brawn*, 277 Mo. 392, 210 S.W. 55 (1919).

6. 243 S.W. 2d 100, 104 (Mo. 1951).

Estate of Huffman, 132 Mo. App. 44, 111 S. W. 848, 854, Newell v. Kern, Mo. App. 218 S. W. 443, Davis v. Johnson, 332 Mo. 417, 58 S. W. 2d 746, Lolordo v. Lacy, 337 Mo. 1097, 88 S. W. 2d 353, and many others, and reviewed also the history of the statutes, and there the court en banc concluded and ruled: 'Under these decisions and others referred to therein, it is our opinion that the title to the disputed assets may be tried by the probate court in a discovery of assets proceeding; and that a money judgment for the value thereof may be rendered *if the party cited is found to have disposed of them* (the specific assets alleged to have been wrongfully withheld or embezzled) *for money after the institution of the proceeding by the filing of the affidavit* pursuant to Sec. 63' (now Sec. 462.400) (358 Mo. 429, 215 S. W. 2d 450).

"The statute contains three fundamentals of jurisdiction (1) that the person cited to appear in court must have the assets of the deceased in his possession or under his custody and control, (2) that such cited person must have concealed, embezzled or wrongly withheld such assets, and (3) that the assets are the property of the estate in question. There is no evidence whatever in this record of the first and second just above stated jurisdictional requirements of the statute. The statute states that 'the court may cite *such person*' (whom affiant has good cause to believe and does believe) who 'has concealed or embezzled' the claimed assets. There can be no authority against the personal representatives of the person who embezzles assets, unless such personal representatives have possession, custody and control of the disputed assets, or unless it appear that they received, as a part of their intestate's estate, the proceeds of the sale or other disposition of such assets. But appellant alleges in her affidavit that she believes the personal representatives of Joseph Lipic, Sr., deceased, have the alleged assets 'in their possession or under their control.' Upon the trial it was proved, and appellant concedes, that the personal representatives did not ever have such claimed assets in their possession or under their custody and control. We find no proof that the personal representatives ever received the proceeds of the sale or disposition of the assets. And it affirmatively appears that they *did not* receive any of such proceeds. Under Lipic v. Flynn, supra, before a money judgment can be rendered in this character of action against them, respondents (the persons cited) must have possession of the assets and refuse to turn them over, or be guilty of conversion of the assets either by disposal of the assets after the filing of the affidavit, or by their refusal to surrender such assets, or their proceeds.

"We rule that under these circumstances appellant may not have a money judgment in this proceeding against respondents for the alleged value of the claimed assets. And we approve what the court

said in *White v. Blankenbeckler*, 115 Mo. App. 722, 726, 92 S. W. 503, 504, as follows: 'It is not clear on what theory of law the defendant, as administrator, can be deemed a party to a wrongful conversion of personal property by his intestate. It seems to us that plaintiff's remedy is the ordinary one provided by law for the allowance of demands against a decedent's estate in the probate court.' See also, *Welch v. Diehl's Estate*, Mo. App., 278 S. W. 1057."

Zeitinger v. Mitchell,⁷ is a case where plaintiff sued for false arrest arising out of an attachment and commitment against Zeitinger for failing to pay over money held due to an estate in a proceeding for a citation for concealment of assets. The court upheld the power of the probate court to issue the original citation, saying:

"Money is a generic term. It has been held to be property. *Shemwell v. People*, 62 Colo. 146, 161 P. 157, 159. Money has been held also to be personal property within statutes authorizing personal property to be collected and recovered in citation proceedings such as were here adjudicated in Wayne County. In *re Willich's Estate*, 338 Ill App. 289, 87 N. E. 2d 327, 329. Money does not mean currency or specie alone, it means also wealth, capital and property. In *re Robinson's Estate*, 175 Misc. 433, 23 N. Y. S. 2d 905, 907 and cases there cited. And 'money' may be currency, not earmarked, and passed from hand to hand. *Newco Land Co. v. Martin*, 358 Mo. 99, 213 S. W. 2d 504, 509. By the word 'money' as used in Section 462.400 is not meant alone the *specific* currency, specie, check or other written instrument payable in money on demand which the person charged actually received at the time he received the money thereafter adjudged to have been concealed, embezzled or wrongfully withheld. The statutes do not limit the discovery and recovery to the *specific* currency, specie, check or other written instrument payable in money on demand so originally received. Proceedings lie under these statutes against one who 'has concealed or embezzled, or is otherwise wrongfully withholding . . . money . . . of the deceased' even though the money of the deceased, or the proceeds of the sale of chattel or property of such deceased were deposited by the person so charged in a bank and thus commingled with other monies of the person so charged in a general bank account, or otherwise converted. As an alternative remedy, it has been held that the contempt and attachment features of Section 462.430 may be waived and a money judgment may be awarded. *State ex. rel Lipic v. Flynn*, 358 Mo. 429, 215 S. W. 2d 446; *Wheeler, Adm'x v. Lipic*, Mo. 243 S. W. 2d 100. *Davis v. Johnson*, *supra*; In *re Estate of Huffman*, 132 Mo. App. 44, 111 S. W. 848.

7. 244 S.W. 2d 91, 95 (Mo. 1951).

"As supporting his contention that the trial court erred in directing a verdict for defendants, the plaintiff argues that the word 'property' in Section 462.430 cannot be held to mean or include *money*. From plaintiff's conclusion upon such argument, he asserts that the probate court had no jurisdiction to issue the commitment and that therefore his arrest and commitment to jail were unlawful. But with plaintiff's just above stated conclusion, assertion and position we do not agree.

"As above pointed out Section 462.430 combines into the word 'property', the *money* and other property items separately listed in Section 462.400. In the Missouri cases considering these sections of our statutes, the money of a deceased person, alleged by proper statutory affidavit to have been concealed, embezzled or wrongfully withheld from such deceased person's estate, has always been considered as *property* of the estate of such deceased person within Section 462.430; and our courts have uniformly assumed jurisdiction and proceeded under these four statutes to discover and collect such money. *Davis v. Johnson*, supra; *Kunst v. Walker*, Mo. App. 43 S. W. 2d 886. See also, *In re Willich's Estate*, supra."

The court follows the weight of authority outside Missouri and certain analogous precedents in Missouri and holds that an attachment and commitment for violation of such a judgment on citation was not an unconstitutional imprisonment for debt.

Wells v. Goff,⁸ is an important development in the law applicable to claims for services to decedents. The court denied recovery, saying:

"... There may have been no illicit cohabitation and they may not have lived together as husband and wife but it does not follow that there was no family relationship.

"But absent some of the elements usually attributed to those living together as husband and wife or in a quasi-marital relationship (9 Cor. L. Q. 246) theirs was indeed an anomalous social relation. However, 'even where no ties of kinship exist between the parties, *the fact that they stand in any peculiar relation to each other* may have a very important bearing upon the presumptions arising in the case and the burden of proof. For whenever the relationship of the parties is such as to lead a responsible person to believe that the services are performed gratuitously, then the presumption is indulged that they are not to be paid for, and the burden is cast upon the party asserting the claim to overcome this presumption.' *Hyde v. Honiter*, 175 Mo. App. 583, 598, 158 S. W.

8. 239 S.W. 2d 301, 303 (Mo. 1951).

83, 88. Kinship in any degree, or apparent cohabitation, are not necessarily essential to the establishment of a family relation. *Brunnert v. Boeckmann's Estate*, Mo. App., 258 S. W. 768, 770. In their essentials Stella's relationships and claim are fairly comparable to the relationship and claim in *Manning v. Driscoll's Estate*, Mo. App., 174 S. W. 2d 921, 922. There the deceased, a widower, and the claimant, a widow, were old friends. After Mrs. Manning's husband died the deceased asked her 'if she would keep house for him.' He rented a house and for the next thirteen years she kept house for him. He usually paid the rent, sometimes she did. He bought a restaurant and Mrs. Manning and her son operated it. He called her 'Jose', and she called him 'Ed.' Their friends, in describing the manner in which they lived, said, 'their home,' or 'where they lived', or 'when they were living in the Mike Ransford property', and one said 'she took in washing after she and Ed started living together.' The court held, as a matter of law, that a family relation existed and in the absence of an express contract or of a contract implied in the fact that Mrs. Manning could not recover for her services. The court defined the term 'family relation' and said: 'In this case while there were no ties of blood kinship between the parties, they had been close friends for many years, and from the time they began to occupy or live in the same home, until the death of Driscoll, absent cohabitation, there was no difference in their home life than prevails in the homes of other families consisting of a husband and wife.'"

Hart v. Parrish,⁹ rules that a childless widow who had elected to take one-half of her deceased husband's property could recover a one-half interest in property sold under execution prior to his death for a price so grossly inadequate as to shock the conscience of the court.

In *re Franz's Estate*,¹⁰ the trial court overruled exceptions filed to final settlements in the estates of Walter G. Franz and Ernst H. Franz. In the Walter G. Franz estate the court held, after reviewing the evidence, that there had not in fact been a binding contract limiting to \$15,000.00 the commissions payable to Mississippi Valley Trust Company, as ancillary administrator of the estate of Walter G. Franz. In the Ernst H. Franz estate, there had been a previous surcharge of \$40,000.00 out of \$48,000.00 paid out as legal fees (on the ground that only \$8,000.00 was allowable).¹¹ In the present proceeding, the attempt was made to surcharge the administrator with interest on the \$40,000.00 for the period after it was paid out of the estate

9. 244 S.W. 2d 105 (Mo. 1951).

10. 242 S.W. 2d 490 (Mo. 1951).

11. In *re Franz's Estate*, 346 Mo. 1149, 145 S.W. 2d 400 (1940).

until it was returned thereto. The court ruled, however, that this issue was *res adjudicata*, as the liability, if any, for interest should have been raised in the earlier proceedings.

*Lipic v. Wheeler*¹² was a suit wherein trustees, after delay, sought a determination of their rights and distribution of the trust pursuant to court order. The settlor of a living trust named himself as trustee and reserved the "right to amend or alter this trust from time to time as I shall deem proper and expedient". The court held effective informal withdrawal of trust assets, where all of the affairs of the trust were conducted by the settlor-trustee very loosely. The court denied commissions to the trustees for concealing from two of the six beneficiaries thereof the existence of the trust for twenty-two months and failing to seek court advice as to their conflicting duties as executors and successor trustees. It surcharged them with 6% interest on funds held uninvested for more than three years even though the short-term interest rate was only 1% to 1½%, saying:

"... Knowing that final distribution could not be made until the tax questions and matters involved in other suits were settled, they failed, for over a period of three years, to reinvest funds. Like the servant who traded not with his one talent but 'went and digged in the earth and hid his lord's money,' these co-trustees neglected to secure any interest whatsoever upon substantial portions of the trust assets. Their conduct requires that they be held liable for 6% interest on these funds, \$1994.59."

The costs of the litigation (apparently not including any attorney's fees) were ordered apportioned among the six beneficiaries of the trust.

II. CONSTRUCTION

Most will construction cases are of interest only to the beneficiaries of the particular instrument. They determine the meaning of particular words which probably will not, and in many instances certainly should not, be used again. Such were the decisions in *Ramsey v. City of Brookfield*,¹³ and *St. Louis Union Trust Company v. Herf*.¹⁴ The court, however, also decided a number of cases of more general interest.

The impact of rising estate and inheritance taxes and the tendency of individuals not to make clear who is to bear the economic burden of such taxes on the person's death, make the decision in *Lipic v. Wheeler*,¹⁵ of con-

12. 242 S.W. 2d 43, 50 (Mo. 1951).

13. 237 S.W. 2d 143 (Mo. 1951).

14. 235 S.W. 2d 241 (Mo. 1951).

15. 242 S.W. 2d 43, 49 (Mo. 1951).

siderable practical importance. There the court had before it the question of whether the burden of such taxes should fall solely on the probate estate of Joseph Lipic, Sr., or be borne in part by a living trust, the value of which was included in determining the amount of the tax. The court there ruled:

"Joseph Sr.'s will was silent as to taxes. One of the provisions of the trust declaration authorized the successor trustees 'to pay any and all taxes which may be assessed against the property included in this trust, whether state, municipal, federal, income or inheritance taxes, and to sell part of the trust estate property for such purpose.'

"Defendants assert that this tax provision 'relates to taxes "assessed" against the property included in the trust, and federal estate taxes are not "assessed" against the trust property.' Furthermore, they contend, as the provision does not mention 'estate' taxes, the intention was to exclude federal estate taxes.

"We cannot so strictly construe the tax provision. On the contrary, it is quite clear that Joseph Sr. intended that the trust estate be obligated for *any and all* taxes which his own estate was legally obligated to pay upon the trust assets. See *Priedeman v. Jamison*, 356 Mo. 627, 202 S. W. 2d 900. Assuming that federal estate taxes are not technically 'assessed' against trust assets, we do not believe that Joseph Sr. used 'assessed' in a narrow sense or that he meant a technical 'tax assessment.' Similarly, we think that he used 'inheritance taxes' in the broad sense of 'state or federal "death duties"' and not with any thought of including state 'inheritance' taxes and excluding federal 'estate' taxes. See *Ferguson v. Massachusetts Audubon Soc.*, 316 Mass. 436, 55 N. E. 2d 891.

"The very presence of the tax provision shows Joseph Sr.'s intention to shift from his own estate some of the taxes for which that estate would be liable on account of the trust asset. And we think he meant just what he said — 'any and all taxes.' See *Priedeman v. Jamison*, *supra*. And note again the authorization for the sale of part of the trust assets for the purpose of paying the tax obligations he had imposed upon the trust estate. Read it in its entirety the tax provision reflects a clear intent to require the trust estate, and ultimately the trust beneficiaries, to bear its and their share of all 'death duties,' including the federal estate tax.

"It is immaterial whether the tax provision was mandatory. The co-trustees have shown their intent to act under this authorization and to reimburse the Joseph Sr. estate the trust estate's pro rata share of these taxes when same are ascertained. They cannot do so until the amounts are finally determined. They may have to sell some of the trust assets to secure funds with which to pay the taxes. They must act in this matter prior to final distribution.

We hold that the co-trustees are entitled to reimburse the Joseph Sr. estate the trust's pro rata share of these taxes and take credit therefor in the final distribution of the trust estate. See *In re Poe's Estate*, 356 Mo. 276, 201 S. W. (2) 441."

The much litigated issue of whether subsequent words are effective to cut a fee simple down to a life estate with remainder over was before the court in *Vaughan v. Compton*,¹⁶ and *Housman v. Lewellen*,¹⁷. In both cases the court ruled that the fee simple was not changed into a mere life estate.

Lang v. Estorge,¹⁸ is one of those rare cases wherein the court actually construed a will so as to create a partial intestacy, saying:

"As argued by respondent, there is a strong presumption against partial intestacy. *Paris v. Erisman*, supra; *Smoot v. Harbur*, 357 Mo. 511, 209 S. W. 2d 249, 250, 252. But 'where the language used by the testator is plain and unequivocal the court cannot give it a different meaning, for the purpose of carrying into effect a conjecture or hypothesis of the testator's intention, by supplying, rejecting, or transposing words or phrases.' *Crowson v. Crowson*, 323 Mo. 633, 19 S. W. 2d 634, 637.

"To construe the will as contended by respondent would have her will speak exactly the opposite of her clearly expressed intention. That we are not authorized to do. Furthermore, the evidence does not show whether Mrs. Gaertner intended to dispose of all of her property by will. We only know she did not so dispose of it. However desirable it may be to construe her will to avoid partial intestacy, yet we may not do so in the absence of evidence of an ascertainable intention on her part so to do. *Crowson v. Crowson*, supra.

"In the case of *Smoot v. Harbur*, supra, cited by respondent, there was an ambiguity in the wording of the will itself, the meaning of which was made clear by the aid of intrinsic evidence. In the case of *Meiners v. Meiners*, 179 Mo. 614, 78 S. W. 795, extrinsic facts and the will itself revealed an ambiguity and a clear intent on the part of the testator to dispose of his entire estate. No such intent is directly or indirectly shown here. Neither of these cases is in point."

Barksdale v. Morris,¹⁹ deals with the old, familiar and ever troublesome problem that arises where a widower (as here) or a widow elects to renounce

16. 235 S.W. 2d 328 (Mo. 1950), commented upon in 17 Mo. L. REV. 177 (1952).

17. 244 S.W. 2d 21 (Mo. 1951).

18. 242 S.W. 2d 50, 53, (Mo. 1951).

19. 235 S.W. 2d 288, 293 (Mo. 1950).

a will and take his or her statutory rights. The court follows the Maryland case of *Levin v. Safe Deposit & Trust Co.*,²⁰ (involving the renunciation by a widow) saying:

"The widow renounced the will, and took one half of all the estate. The reviewing court was of the opinion the widow's withdrawal of half of the property had deprived her next of kin of all benefit under the will, and left the interest of testator's brother unaffected. The question was, of course, solely one of intention. The court remarked that it is true the renunciation by a widow does not ordinarily cut off interests in remainder upon the termination of a particular estate in her, see again *Lilly v. Menke*, supra; but the Court of Appeals of Maryland further observed that this is true only because ordinarily it is not found to have been the testator's intention that the remainders should be so identified with the particular estate, and dependent upon its coming into effect. The testator's plan appeared to have been to divide his estate equally between two families, half to be taken by his wife and her people, half by the testator's brother (and others of testator's own people). It was the same half that was to pass down to the remaindermen respectively. The court pointed out the provision of the will that, if division should occur on a remarriage of the widow, then later, upon her death, it was the 'one-half share held in trust for her in the event she has remarried' that was to pass to her next of kin, not an independent half share. Adherence to the testator's plan under the altered conditions required that the remainder in the widow's half should be held inoperative of a specific legacy.

"In the instant case, we are constrained to the conclusion that, having rejected the remainder contingently in him or his children in the half of the entire estate and having elected to receive the equivalent in value, the husband rendered inoperative the alternative remainder which might otherwise have been vested in his children."

Scullin v. Clark,²¹ rules that where a life beneficiary and co-trustee had clearly acquiesced in funds, which might in law have been income, being added to corpus, then his personal representative could not recover said funds by bringing a suit for a construction of the will under which her decedent had been such life beneficiary and co-trustee and for an accounting of the trust estate created thereby.

20. 167 Md. 41, 172 Atl. 605 (1934).

21. 242 S.W. 2d 542 (Mo. 1951).

III. WILL CONTESTS

Guidicy v. Guidicy,²² was a suit to contest a will on the ground of testamentary incapacity and undue influence. Where testatrix had cut off one son, the contestant, with \$1.00, proponents were allowed to show that she had filed a citation alleging such son had concealed assets of his father's (her husband's) estate and had told the attorney who later drew the will that "She did not want Remo (contestant) to have anything from her estate because she thought he had too much already". The court held improper, as clearly erroneous, an instruction:

"... 'If, therefore, the jury believe and find from the evidence in this cause that the writing produced and read in evidence was formally executed by Maria Guidicy according to the above requirement of the law, and that two subscribing witnesses thereto have testified to the sanity of the said Maria Guidicy and that she was of proper age to make a will, then the court instructs the jury that *a prima facie case in favor of the will is made out and it rests upon the contestants; that is, the plaintiff in this case, to overcome this prima facie case by substantial evidence.* By prima facie, as used here, is meant such a case as in the absence of evidence to the contrary is held to be true.' " (Italics the court's)

The court found that, unlike the situation in *Schultz v. Schultz*,²³ this error was not cured by other burden of proof instructions and hence reversed and remanded the case. Such a result was, no doubt, made inevitable because there was also conflict in the instructions as to undue influence, one of which imposed the erroneous requirement that such influence must be exerted during "all" the time the will was being executed, while the law in Missouri is settled that the influence may have been exerted prior to the execution of the will, if it persists and causes the particular provisions to be inserted in the will.²⁴

*Norris v. Bristow*²⁵ was the second appeal in a will contest based on alleged lack of testamentary capacity and abuse of confidential relationship. The court upheld the jury's verdict that the will is valid and approved instructions on most of the issues which would normally arise in such a case.

22. 238 S.W. 2d 380, 384 (Mo. 1951).

23. 316 Mo. 728, 293 S.W. 105 (1927).

24. Following *Clark v. Powell*, 351 Mo. 1121, 175 S.W. 2d 842 (1943), and *Kaechelen v. Barringer*, 19 S.W. 2d 1033 (Mo. 1929).

25. 236 S.W. 2d 316 (Mo. 1951).

*Armbruster v. Sutton*²⁶ reviews the facts and rules thereon that the evidence made a submissible case as to both mental incapacity and insane delusions.

*Rothwell v. Love*²⁷ upholds a will contested on the ground of mental incapacity, ruling that the evidence was not sufficient to justify the submission of this issue to the jury.

IV. RESULTING AND CONSTRUCTIVE TRUSTS

*Warford v. Smoot*²⁸ involved a contest between a father and his daughter and son-in-law as to the ownership of a lot and the house erected thereon. The court held that the evidence sustained the decree of the trial court that there was a resulting trust and not a gift where a lot was purchased by the daughter in her own name with money furnished by the father.

In *Thomason v. Berry*²⁹ plaintiffs claimed title to a farm under a constructive trust alleged to have arisen where a tenant in common of a farm bought from the purchasers at foreclosure sale under a deed of trust which had been executed by all tenants in common. The court, however, held that under accepted principles of law, there was not sufficient evidence to justify the creation of a constructive trust based on wrong-doing.

In *Middleton v. Reece*³⁰ the court reviews the evidence and finds it insufficient to establish a resulting trust in real property and a herd of cattle where the evidence failed to show definitely the source of the funds used to purchase the property many years ago or to eliminate possible sources of the cattle other than the increase of those originally purchased.

26. 244 S.W. 2d 65 (Mo. 1951).

27. 241 S.W. 2d 893 (Mo. 1951).

28. 237 S.W. 2d 184 (Mo. 1951).

29. 235 S.W. 2d 308 (Mo. 1950).

30. 236 S.W. 2d 335 (Mo. 1951).